89-102

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARGARITA RIVERA DE FELICIANO, ZENAIDA VALENTIN, EVELYN MIRANDA, ORLANDO ORTIZ ROURA, JOSE VALLINES AND MODESTO MELENDEZ MANGUAL,
Petitioners

v.

FARM CREDIT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the imposition of § 1983 liability to a state entity (or municipality) due to an unconstitutional custom or policy of employee dismissals is inextricably dependent on a finding of liability also against an individual employee or policy maker.

2. Whether government tenured employees can be considered not to have a protected property interest in their employment solely because the hiring authority, by its own failure, did not comply with all required technicalities when the appointments were made, so that the hiring authority can afterwards dismiss them without compliance with required due process or, at least, a *Loudermill* type of hearing.

3. Whether the first circuit improperly applied the well established standards to (1) decide whether a presumably inconsistency in a verdict cannot stand and, (2) to reject jury's factual findings and substitute them for its own.

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Petitioners, Margarita Rivera de Feliciano, Zenaida Bonet Valentin, Evelyn Miranda, Orlando Ortiz Roura, Jose Vallines and Modesto Melendez Mangual, through the undersigned attorney, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is not yet reported. The opinion of the district court (App. C, *infra*, 20a-21a is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 16a) was entered on April 27, 1989. A petition for rehearing was denied on May 24, 1989 (App. B, *infra*, 17a-18a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 1983, 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Title 3, Laws of Puerto Rico Annotated, § 1336(4), provides in its pertinent part:

> (4) The appointing authorities may remove any career employee for good cause, after preferment of charges in writing.

STATEMENT

This is a civil rights action for damages, declaratory and injunctive relief for violation of the Constitution and laws of the United States and Puerto Rico. Plaintiffs sought and obtained a declaration that respondent's action in removing them from their tenured career positions as government employees at respondent, the Farm Credit Corp. (F.C.C.), violated the Due Process Clause as well as their First Amendment rights, because their demotions contravened the established procedures and were exclusively due to political discrimination. Plaintiffs had been government tenured employees for many years (24, 19, 14, 8, 7, 5) and were career regular employees at time of dismissal, as the jury found. In May 17, 1985, plaintiffs were dismissed by receipt of a mere letter, effective the same day, without being afforded any type of hearing at all. Plaintiffs had been recruited and appointed to career regular positions within FCC between the years 1980-1981.[1] In all instances plaintiffs filed the corresponding job applications, were interviewed and their qualifications investigated and approved by the personnel director—who happens to also participate in the 1985 decision to dismiss them—and the then President of the Corporation. After the initial evaluations plaintiffs were considered among other candidates for the job vacancy. Some time later were notified that had been selected for the position. They had to approve a probationary period, which they did. Thereafter they

[1] Five of the plaintiffs came from other government agencies, some with at least a right of restitution (App. F, *infra*, 48a-54a) and one from the federal government (FHA).

were given letters appointing them to their respective positions as career tenured employees within FCC. All this evidence was presented to the District Court and jury.

The jury concluded that plaintiffs' dismissal was due solely to political motivations. Mr. Francisco de Jesus, FCC president, belongs to the Popular Democratic Party (PDP) that won the elections in 1984, while all plaintiffs belong to the New Progressive Party (NPP). Mr. de Jesus became FCC President in January 1985, but had worked there for more than twenty years and personally knew plaintiffs and their political affiliations. In short five months after becoming President, plaintiffs were dismissed.

The filing of the present action ensued and an eight day jury trial was held. FCC's contention at trial was that since it hired plaintiffs unlawfully in the first place, they had no constitutionally protected interest in their jobs and could be dismissed at will. The matter was submitted to the jury, which concluded with the verdict (App. E, *infra*, 29a-31a): 1) that all plaintiffs were tenured career employees: 2) that no hearing prior to dismissal was afforded; 3) that the dismissals were the result of political discrimination because of party affiliation; 4) that such conduct was malicious, oppressive or intentional; 5) that FCC was liable; and 6) awarded compensatory damages, but not punitive. Pursuant to the jury findings, the District Court entered a permanent injunction ordering plaintiffs' reinstatement to their former positions within FCC and back-pay (App. C, *infra*, 22a-24a).

The Appeals Court reversed the jury findings. It held that (a) the political discrimination verdict against FCC could not stand (was inconsistent) in light of the jury verdict in favor of De Jesus, since FCC's liability depended on a finding of liability against De Jesus (FCC

employee and policy maker); and (b) that plaintiffs had no constitutionally protected property interest in their jobs because FCC hired them unlawfully. Although it accepts that the case presented "close and difficult questions" (App. B, *infra*, 18a), it denied rehearing.

REASONS FOR GRANTING THE PETITION

The Court below has decided a federal question of substance in a way not in accord with applicable decisions of this Court and other circuits, nor specifically determined by this Court. The First Circuit mistakenly applied the *Los Angeles v. Heller*, 475 U.S. 796 (1986), rationale to facts that properly belong to the other end of the spectrum, like *Owen v. City of Independence*, 100 S. Ct. 1398 (1980), and *Cleveland Bd. v. Loudermill*, 470 U.S. 532; found inconsistency in a verdict that, seen in light of the evidence and instructions given, is logic, reasonable and in line with decisions in other circuits; totally misapprehended Puerto Rico law with respect to when a public employee acquires a protected property interest in his job, and improperly substituted jury factual findings for its own. The net result was total reversal of the verdict and depriving plaintiffs of their long-held jobs in public service.

I.

The use of excessive force in making an arrest (*Heller*), an illegal search (*Pembaur v. City of Cincinnati*, 106 S. Ct. 1292), or a seizure (*City of Oklahoma v. Tuttle*, 471 U.S. 808), is quite different from a firing without due process (*Loudermill*) and for political discrimination. The First Circuit's application of *Heller* to our facts was unavailing.[2] It assumed that there was in-

[2] In *Heller* it was found that plaintiff had suffered no constitutional injury at the hand of an individual police officer and therefore the city was not liable. The problem with applying that holding to our case is that here the jury found that there was constitutional injury based on FCC policy, for which liability lies.

herent inconsistency in the jury verdict favoring plaintiffs and against FCC because the verdict did not also impose liability on De Jesus and, therefore, required reversal. Despite the Appeal Court's summary assertion to the contrary, the verdict of no liability to De Jesus does not imply lack of an unconstitutional FCC policy to dismiss plaintiffs. The jury determined that for those constitutional violations FCC was the one to be held responsible. The Court of Appeals cannot translate the no liability verdict for De Jesus into a no policy of FCC. It seems to understand that FCC's liability for the unconstitutional policy is inextricably attached to liability by Mr. De Jesus. It erred.

This Court has found a municipality liable for unconstitutional actions of its agents when those agents: enforced a rule of general application (*Monell v. City of N.Y. Dept. of Soc. Serv.*, 98 S. Ct. 2018); were of sufficiently high stature and acted through a formal process (*Owen*); or were authorized to establish policy in the particular area of city government in which the tort was committed (*Pembaur*). Under these precedents FCC should be held liable in this case. No longer is individual "blameworthiness" and acid test of liability, *Owen*, 1418. This clearly shows that FCC liability rests on different grounds from that of De Jesus and need not depend on the latter. Different considerations come into play when governmental rather than personal liability is threatened. *Owen*, 1416-1417, n.37.

The "official policy" requirement was intended to distinguish acts of the municipality from acts of its employees, *Pembaur*, 1298, and *Monell* concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability, "The proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test to determine when such wrongs have occurred", *City of Canton v. Harris*, 57 USLW 4270, 4273, n.8 (1989).

"Where constitutional rights are at stake the courts are properly astute, in constitutional statutes, to avoid the conclusion that Congress intended to use the privilege of immunity in order to defeat them", *Owen* at 1415, n.32. Thus, there was no need here to even sue De Jesus, since a § 1983 plaintiff may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a custom or usage, *Pembaur*, 1299, n.10.

The jury determined that it was FCC policy what caused the constitutional harm. It was not necessary for the FCC President to commit a constitutional tort in order to enable plaintiffs to recover from FCC, as the District Court correctly held (App. C, *infra*, 20a-21a). The instruction as to custom or policy [3] that would bind FCC, seen within the context of this case and the evidence considered by the jury, adequately stated the correct legal standard for imposing liability to FCC under § 1983.

> "if the decision to adopt a particular course of action is properly made by that government's authority decision makers, it surely represents an act of official government policy as the term is commonly understood. More importantly, where action is directed by those who establish government policy, the

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[3] App. F, *infra*, 72a-73a. The jury was charged in pertinent part:

> In deciding this issue, consider the position and executive power of the president of the corporation, his role within the corporation itself, in the context of this case and *whether he acted in his official capacity.*" (emphasis supplied)

The Court of Appeals emphasizes the lack of a qualified immunity instruction to conclude that the jury could not have determined that De Jesus (sued in official and personal capacity) was entitled to it and, therefore, the findings can only be construed as no constitutional deprivation at all. That is a strained reading of the instruction and verdict. The jury did not have to consider the elements of a qualified immunity defense, but did consider De Jesus' official acts with respect to FCC liability.

> municipality is equally responsible, whether that action is to be taken only once or be taken repeatedly. To deny compensation to the victims would therefore be contrary to the fundamental purposes of § 1983".

Pembaur at 1299. De Jesus made the decision, but FCC's policy of dismissals did not rely exclusively on him. The record here shows various meetings held soon after the 1984 elections among FCC personnel to draw-up lists of persons to be dismissed (Zenaida Valentin testimony, App. F, *infra*, 37a-38a)[4]; the general atmosphere that generated in the work place immediately after the elections; the subtle harassment against plaintiffs; the discriminatory fashion by which plaintiffs were dismissed while other employees that had been recruited in a similar fashion were not, and the farse contained in the evaluation committee reports. De Jesus appointed a committee composed by the personnel officer, the comptroller and the head of the legal division, to evaluate the files of all managerial employees and render a report as to the validity of each appointment. It is noteworthy, though, that the personnel officer that was part of said committee is the *same personnel officer* who recruited and appointed plaintiffs (Mr. Osvaldo Rios). The record is crystal clear as to the manipulative manner in which the evaluations were performed, with the deliberate intention to "justify" plaintiffs' dismissals. And the jury so found. For example, Mr. Jose Vallines' evaluation (one of the two First Vice-Presidents), was *identical* to that of Mr. Carlos Ortiz (the other First Vice-President), but it was recommended to dismiss Vallines and retain Ortiz, a PDP member (App. F, *infra*, 57a-58a). Further evidence of usage or custom is the requests for political endorsements in order not to dismiss plaintiffs. The jury heard and saw uncontroverted testimony and documents about

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[4] All references made to trial transcript are included in the Appendix (App. F) in numerical order.

this (Plaintiffs' Exh. 31-34, App. F, *infra*, 32a-37a). Also, De Jesus had the choice to dismiss plaintiffs after a hearing—as did in *Arbona v. De Jesus Gotay*, 678 F. Supp. 40 (DPR 1988)[5]—or without a hearing. In our case he chose the latter, thus violating due process. The manner in which plaintiffs' constitutional rights were violated is a direct result of FCC policy. It was a pattern designed within FCC and to which De Jesus acquiesced and/or participated and/or had knowledge of and did nothing to avoid it. FCC is liable as a matter of law for plaintiffs unconstitutional discharge. If a city cannot be held liable under § 1983 unless claimant proves the existence of an unconstitutional municipal policy, *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 926 (1988), then once the unconstitutional policy is proven, as here, liability exists. The jury determination is supported by sound legal precedent.

The two requirements for plaintiffs to meet in maintaining a § 1983 action grounded upon an unconstitutional municipal custom were met here. First, the custom or practice must be attributed to the municipality. In other words, it must be so well settled and widespread that the policy making official of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind a deprivation of constitutional rights. *Praprotnik*, 925-926; *Monell*, 694-695. The evidence here, if viewed in plaintiffs favor, as it should, meets both requirements. When the incident in question involves the concerted action of a large contingent of individual municipal employees, the event itself provides some proof of the existence of the underlying policy or custom, *Kibbe v. City of Springfield*, 777 F.2d 801, 805-806 (1st Cir. 1985). That was shown

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[5] This is one of the reasons why the *Arbona* decision is not applicable to our case, contrary to what FCC argued and the First Circuit held.

here. Further, the evidence supports a finding that De Jesus had constructive knowledge of the unconstitutional policy. Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of their official responsibilities the municipal policy makers should have known of them. And allowing this custom to continue amounted to a deliberate indifference to plaintiffs' rights, making a constitutional violation almost bound to happen, sooner or later. *City of Canton v. Harris*, at 4273. In our case, the jury reasonably concluded that there was supervisory encouragement, condonation and even acquiescence in the unconstitutional practice. De Jesus' failure to eradicate this facially unconstitutional practice in FCC attributes that custom to FCC. Furthermore, the evidence also shows that FCC's Board of Directors had at least constructive knowledge of the policy and did nothing to prevent it. This binds FCC. It is legally sound to conclude, as the jury did, that FCC is liable, without need for a similar finding against De Jesus. After all, the jury finding that the constitutional deprivations were the result of malicious, oppressive or intentional conduct applies to governmental entities and individual officials alike, *Owen*, 1425 (J. Powell dissent). The jury found that plaintiffs met these requirements and proved the unconstitutional policy. The Court of Appeals reversed.

There is wording in *Praprotnik* at 926-927 as to subordinates' decisions adopted as policy (and J. Brennan's concurrence at 931, 932), which is very much in line with our jury conclusion. The committee evaluations contained the policy to discriminate. Once that policy was approved by De Jesus as President, the responsibility lies with FCC. *Monell* has clear language that as long as that official takes the decision, there is municipal liability.

The Court of Appeals concedes at Op. 6-7 (App. A, *infra*, 5a-6a) that in other circuits verdicts in favor of

individual defendants but against institutions have been found consistent-thus, our jury finding is not error of law—but ruled otherwise. Whether "the jury verdict exonerating the individual defendants cannot be reconciled with the verdict against the city", was precisely an issue not addressed by this Court in *Praprotnik*, at 926. It is respectfully urged to address it now.

Another wording in *Praprotnik* at 928 is also applicable here. "Refusal to carry out stated policies could obviously help to show that a municipality's actual policies were different from the one's that had been announced. If such a showing were made, we will be confronted with a different case, than the one we decide today." In this context, FCC's policy to disregard the OCAP normative letter (plaintiffs' Exhibit 1, App. F, *infra*, 60a-64a)[6] proves to be the refusal to carry out stated policies, for which FCC is liable.

That an unconstitutional policy existed at FCC which deprived plaintiffs of their rights is beyond question. That the existence of said policy need not be necessarily tangled with direct liability by De Jesus is the clear import of this Court's precedents and § 1983's purpose. Contrary to the First Circuit holding, the jury findings and conclusions are legally acceptable.

1b. The First Circuit itself has said: ". . . we have uppermost in mind the strictures of both law and sense that dictate a deference to the facts and inferences therefrom as they could have been found by the jury . . . We may reverse . . . only upon a finding that the evidence could lead reasonable persons to the sole conclusion that the City was not liable. *Wildman v. Lerner Stores*, 771

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[6] The Central Office of Personnel Affairs of Puerto Rico (OCAP in Spanish) had issued and circulated to all government agencies, including FCC, a normative letter detailing the procedure to be followed before dismissal of any regular career employee, so that full compliance with *Loudermill* be observed. It was not.

F.2d 605, 607 (1st Cir. 1985). We must review the evidence in the light most favorable to appellee. *Fishman v. Clancy*, 763 F.2d at 486-486 (1st Cir. 1985)." *Kibbe, supra* at 806-807. These principles are particularly pertinent in our case, but the Court of Appeals failed to follow them. In *Aurora Figueroa v. Aponte Rogue*, Slip. Op. of Jan. 4, 1989, #88-1525 and 88-1526, the First Circuit held that a jury determination that plaintiffs were not terminated because of political affiliations should not be overturned. It said that "the case turned largely on the credibility of the government's witnesses, and it was not our place to second-guess the jurors' conclusion", *Ibid.* at 9-10. As a matter of fact, the jury there was given interrogatories similar to those in our case (whether the personnel action taken was the result of political discrimination because of party affiliation), and the jury answered "no". In our case the jury answered "yes". The Appeals Court in *Aurora Figueroa* decided not to second-guess the jurors' conclusion. In our case decided to do so.

The inconsistency found by the Court of Appeals was its own coinage because the issue was waived by FCC counsel at trial (App. F, *infra*, 74a), never raised on appeal nor briefed, and during oral argument the Honorable members of the panel did not pose any questions on this issue.[7] The Court of Appeals resurrected the issue on its own to reverse the verdict. The duty of courts to attempt to harmonize jury answers under a fair reading was not followed here. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963); *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). In the federal system a trial judge cannot displace a jury's verdict merely because he disagrees with it or could have found otherwise. Absent error of law

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[7] The discussion was centered on the 11th Amendment defense, the controlling issue in appeal as per the Court's preliminary orders to stay injunctive relief (App. D, *infra*, 25a-28a).

(not present here) the judge's prerogative to set aside a verdict crystallizes only if it is quite clear that the jury has reached a seriously erroneous result. *Borras v. Sea Land Services Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). This is known as the "manifest miscarriage of justice standard". *Millone v. Moseric Family Inc.*, 487 F.2d 35 (1st Cir. 1988). But the only miscarriage of justice here is the reversal of the verdict. Courts must attempt to reconcile jury findings, by exegesis, if necessary, before they are free to disregard the jury's verdict. *Gallick*, at 109. One of the great values of jury trial is the ability to reflect the community sense of overall fairness, and this need not in all cases coincide with the written law and the instruction that the court must give. *Heller*, at 805, n.12 (J. Stevens dissent). These are the guidelines. The First Circuit, regretfully, embarked in a different direction to reverse.

II.

The procedural due process violation here is startling, and a profound sense of unfairness (substantive due process) whirls around all this situation. The OCAP normative letter was issued and circulated prior to plaintiffs dismissals, but FCC totally disregarded it and did not afford them any type of hearing. To circumvent the *Loudermill* mandate, FCC propounded the ingenious argument (rejected by the jury and District Court) that since FCC hired them unlawfully in the first place, they had no protected property interest. The First Circuit approved.

In Puerto Rico it was long established that public employees acquire a protected property interest in employment by different means, being one of them when the circumstances create an expectancy in continued employment, as was clearly established here. "Public employees have an acknowledged interest in their continued employment if said interest is protected by law *or* when the circumstances create an expectancy of continued em-

ployment." *Pierson Muller I v. Feijoó*, 106 DPR 838, 852 (1978); *Morales Narváez v. Gobernador*, 112 DPR 761, 767 (1982); *Department of Natural Resources v. Correa*, Opinion of the Supreme Court of Puerto Rico of April 15, 1987, 87 JTS 35. The First Circuit refused to follow these rulings.

The Public Service Personnel Act, 3 L.P.R.A. § 1301 *et seq.*, establishes two basic categories of public employees: career and confidential. 3 L.P.R.A. § 1349. Upon satisfactory completion of a probationary period, as plaintiffs here, the employee acquires the status of a regular career employee, 3 L.P.R.A. § 1333(10), who has job security and may only be removed for just cause, after preferment of charges. 3 L.P.R.A. § 1336(4).

Plaintiffs were regular career employees and their expectancy in employment was not unilateral; it stemmed from many factors and circumstances that took place during the selection process for the positions to which they applied, and even after the appointments, as stated previously. There is a very particular situation in our case. It just happens that the same personnel director that originally evaluated, interviewed and qualified plaintiffs for their positions within FCC is the same one that in 1985 forms part of a committee that performed evaluations of plaintiffs' personnel files and "found" that plaintiffs' initial appointments were made in contravention of FCC regulations. He was FCC's key witness during trial (Mr. Rios). The jury and the District Court heard and saw him in the witness stand. The jury rejected his version of the facts because of the many contradictions and lies. For example, and the record clearly reveals this, in direct testimony Mr. Rios said that none of the plaintiffs had approved a probationary period—the evaluation reports also concluded this —but when confronted in cross-examination with plaintiffs' original personnel files—of which he is the custodian—a mere superficial glance through the docu-

ments revealed that plaintiffs had in fact been submitted to probationary periods and approved them (App. F, *infra*, 43a-45a, 56a-57a). FCC's own regulations establish that every employee that satisfactorily approves the probationary period will occupy a regular career position (Plaintiffs' Exh. 2, Art. VII, § 8f, page 20). Therefore, plaintiffs did not only establish that they had a legitimate expectation in employment due to the circumstances by which they were recruited and appointed to FCC, but it was also established—and the jury found —that plaintiffs' appointments were made *in compliance with FCC regulations.*

FCC tried to establish that the appointments were null and void because, apparently, a notice of job placement was not made for the positions that plaintiffs occupied, or that there was no registry of eligibles prepared at the time the job vacancies were filled by plaintiffs. Besides the fact that the jury did not believe these allegations, it was clearly established that the duty to comply with those requirements pertained to the personnel director as part of his job, not to plaintiffs (App. F, *infra*, 47a-48a). FCC has always pretended that the alleged non-compliance with these technicalities be held against plaintiffs, while the duty really belonged to FCC. If in fact no notice of job vacancy was published or registry of eligibles kept, such failures can only be attributed to FCC. But no, FCC's argument has been, and the Court of Appeals adopted at Op. 17 (App. A, *infra*, 11a), that since the appointments did not comply with the technicalities, they were void *ab initio*,[8] thus plaintiffs never existed as career employees. But this same argument

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[8] The meaning of the phrases "null and void" and "null ab initio" must be derived from the context of the cases in which they are used. They do not have a life of their own and cannot be transferred bodily to a situation involving different facts, as said by the First Circuit in *Santiago Negron v. Castro Davila*, 865 F.2d 431, Slip Op. No. 87-1869 of January 11, 1989, at 10.

was forcefully rejected by the First Circuit in *Santiago-Negron* at 14 in the following terms: "We reject this Kafka-like logic." It stated further at 12:

> "Regardless of whether the municipal employees were hired in accord with the personnel laws of Puerto Rico, they were municipal employees. We do not think that a new administration can use the "nullity" of appointment doctrine as a cover for discharges, transfers and discrimination based solely on political affiliation".

Precisely what happened here. This is consonant with the jury findings in our case and the Circuit's own precedent. In the present case plaintiffs had a legitimate expectation and cannot be held responsible for what they did not have to do. They did not lie as the employee in *Loudermill*, whom this Court reinstated. The right to work is a constitutional inalienable right according to the Supreme Court of Puerto Rico. *Amy Angulo v. Administracion*, 116 DPR 414 (1985). Plaintiffs were deprived of their property and their constitutional right to work without a previous hearing. In the case at bar there are plaintiffs of more than twenty years in public service and the same defendant (FCC) that appointed them later dismissed them because, allegedly, what FCC did was illegal. This attitude should not be tolerated by any court, as it was not tolerated by the jury nor the District Court. Even the First Circuit rejected it in another case. It cannot be assumed that they were illegally hired and, therefore, had no property right and could be removed without a pretermination hearing, or hearing at all, as happened here. In the present case plaintiffs were treated and discharged like intruders who had no right to a pretermination hearing. After a person has been chosen for a public office, there is a presumption that he possesses the prescribed qualifications, that he was duly appointed, and that the person appointing him properly looked into and determined the question of his eligibility.

Allen v. State 21 Ga. 217; *Boston v. Pinso*, 77 W.Va. 412, 89 S.E. 985. FCC failed to rebut this presumption and the First Circuit opinion is directly in conflict with this principle. A mere irregularity or mistake in making the appointment is insufficient basis for setting it aside after the probationary period has expired, especially where the appointee was not responsible for the error. See *State ex rel. Carstater v. Civil Service Board*, 10 N.W.2d 422; *People ex rel. Finnegan v. McBride*, 123 N.E. 374; *Pape v. Kern*, 26 N.Y.S. 2d 379; *State ex rel Byrd v. Sherwood*, 42 N.E. 2d 889; *Kluth v. Andrus*, 94 N.E. 2d 823, 830. FCC's alleged own failures served as the tool to politically discriminate and take property without due process.

In *Soto v. Mayor of Bayamon*, 99 DPR 415; 99 PRR 404 (1970)—not considered by the First Circuit—the Puerto Rico Supreme Court held that an employee that was appointed verbally and had not been sworn in as required by law, even if he was not a "de jure" employee, he was a "de facto" employee, and had a right to employment of which he could not be deprived without a pretermination hearing. It was held that failure to comply with all the requirements is not decisive. In *Lupiañez v. Srio. de Instrucción*, 105 DPR 696, also overlooked by the First Circuit, there was only a promise by the hiring authority to appoint the employee in a permanent position which was never completed. When a new hiring authority removed her without a hearing because she was not a career employee, the Puerto Rico Supreme Court ordered her reinstatement because she was deprived of her property right without a hearing. At page 900 it was expressed:

> Appellee's rights were violated when she was dismissed without giving her the opportunity to be heard. *Connell v. Higginbotham*, 403 U.S. 551 (1956); *Soto v. Mayor Municipality of Bayamon*, 99 P.R.R. 404, 406 (1970); *Arcelay Rivera v. Police Superintendent*, 95 P.R.R. 205, 219 (1967);

> *Santiago Agricourt v. V.H.R.C.*, 90 P.R.R. 816, 820 (1964). She was deprived of her property without the due process of law there existing an explicit and clear contract between the parties. A property interest in employment can, of course, be created . . . by an implied contract. *Bishop v. Wood*, 44 U.S.L.W. 4821 (U.S. June 10, 1976); *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1971); *Wieman v. Updegraff*, 344 U.S. 183 (1952). The evidence established that Mrs. Lupiáñez genuinely hoped that the position she held would be given a permanent character. She was fully convinced and sure that she would remain in said position and that she would not be dismissed, notwithstanding the fact that, for budgetary purposes, her appointment was by contract and temporary" (Official Transition of the Opinions of the Supreme Court of Puerto Rico, Vol. 5, pgs. 972-973)

In our case there was more than a promise; there was tenure. Given the fact that plaintiffs were career employees, they had a clear properly interest in continued public employment. *Kercado-Melendez v. Aponte Roque*, 829 F.2d 255 (1st Cir. 1987).

In addition to the Puerto Rico Supreme Court precedents cited above, the First Circuit itself and this Court have held that property interests may be created not only by explicit contractual provisions but also by an implied contract or officially sanctioned rules of the work place. *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972); *Cheveras Pacheco v. Rivera González*, Slip Op. 86-1428, First Circuit, January 13, 1987, pg. 3. This Court explained the basis for considering jobs in government "property" in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972): "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined," cited by the First Circuit in *Bennett v. City of Boston*, Slip Op. of March 9, 1989,

#88-1763 at 6. The First Circuit also held that "an employee's job becomes more like his house or his land; it is, speaking legally about state law, difficult for the state to take it from him . . .; the focus must remain upon the nature of the employee's legitimate expectation of continued entitlement to his or her job," *ibid.* at 6-7. The First Circuit's departure from these principles is simply unacceptable. Plaintiffs here had a legitimate expectation in continued employment. The issue—hotly debated—was definitely decided by the jury in plaintiffs' favor. The First Circuit reversed.

But even more, the jury here found that the motivating factor behind plaintiffs' dismissals was clearly political discrimination, thus in violation of their First Amendment rights. A political dismissal is no less offensive to the First Amendment because the person dismissed does not have tenure. *Estrada-Isquierdo v. Aponte-Roque*, Slip Op. 87-1567, June 28, 1988. In *Estrada* the First Circuit itself rejected an argument very similar to the one that FCC made here. It concluded at 15:

> "Likewise, even if *Estrada* did not have tenure because of some technical difficulty of the Art. 7.9, she would still have a cause of action against Aponte if Aponte demoted her because of her political affiliation."

This language is equally applicable here, but the Appeals Court refused to follow it this time. In short, the technicalities relied upon by FCC—accepted in appeal—to argue that plaintiffs had no tenure or protected rights, albeit rejected by the jury, are not sufficient because even if those "deficiencies" in appointment existed, FCC still could not discriminate for political reasons, as it did here. "We think it was made clear in *Elrod* and *Branti* that technical niceties are not to be relied upon to avoid application of the principles stated in those cases," *Cheveras, supra* at 7.

2b. To overturn the jury due process finding, the First Circuit relied in *Kauffman v. PRTC*, 841 F.2d 1169 (1st Cir. 1988). In said case the district judge found as undisputed that plaintiffs were hired from outside PRTC without advertising the position openings in any manner nor affording internal employees first consideration, thus concluded that the appointments were illegal. Our jury—factfinder—held that plaintiffs complied with FCC regulations and were legally hired. That is the clear import of the verdict. The appeals court in *Kauffman* accepted the district court judge's factual determinations adhering to the traditional standard of review, but rejected here, without explanation, the jury finding. This is important because, by rejecting it, the First Circuit is free to apply *Kauffman* to our facts. Without saying, it holds that the jury misperceived the evidence. The crucial problem in that posture is that, to discard the jury finding, it must be "so clearly against the weight of the evidence that it produces a manifest miscarriage of justice", *Aurora Figueroa* at 8. There is no conceivable manner in which, on this record, the standard is met to justify the Court of Appeals to substitute its own factual determinations for that of the jury. The Court's de novo review of the facts is contrary to the standard which, in the case of a jury trial, is bound to be even more deferential, *Aurora Figueroa* at 6-7, n.3; *Wagenman v. Adams*, 789 F.2d 196 (1st Cir. 1987). With all due respect, the First Circuit retried the case for FCC. Reversal on this issue alone would warrant the Judgment to be restored.

Whether plaintiffs were legally or illegally hired to career positions was precisely the key disputed issue at trial. The jury found that plaintiffs were career employees. The jury evaluated documentary and testimonial evidence of both parties, but mainly that presented by FCC, which it obviously rejected. Said documentary evi-

dence—audits and committee reports—is relied upon by the Appeals Court to support its conclusion that plaintiffs were illegally hired. The weight of that evidence was fully considered, and rejected, by the jury, mainly because other evidence showed that said documents were used as a sham and as a mere excuse to justify the dismissals. The jury also heard and saw the testimony of Mr. Rios—FCC main witness in this matter—and rejected his version of the facts. The Court of Appeals transgressed the jury finding and fully accepted Mr. Rios' contention.

It is noteworthy that, upon finding that plaintiffs were illegally hired, the Court of Appeals makes emphasis on FCC Regulation (Article VII, § 2-5), which required posting of a public notice and opportunity to compete (App. A, *infra*, 14a). But the Court of Appeals is oblivious of that other part of the Regulation (Art. VII § 8f) which establishes that once an employee approves a probationary period, he or she becomes a career employee, who can be dismissed only for good cause after preferment of charges, Regul., Art. IX § 2 (h), T.3 LPRA § 1336(4). The undisputed fact—key fact—in this matter is that plaintiffs had approved their probationary periods. FCC failed to contradict or rebut this. Even Mr. Rios admitted so in cross-examination (App. F, *infra*, 43a, 45a, 56a, 57a). Therefore, the Court of Appeals had to accept it, but did not. Having approved the probationary periods, plaintiffs attained career status—a protected property interest that cannot be denied without due process of law. That is the legal implication of the verdict. Plaintiffs were entitled to a hearing prior to dismissal, which was denied (also undisputed). FCC failed to follow the established procedure in order to properly dismiss career employees; the procedure ordered by OCAP normative letter. The Court of Appeals turned a blind eye on this overwhelming evidence.

Kauffman and this case are not similar.[9] The Court of Appeals at Op. 17 (App. A, pg. 12a) applies *Kauffman* to our set of facts because it "had been applied unreservedly in the setting of a full jury trial in *Santiago Negron*". But in *Santiago-Negron*, the First Circuit defined the contours of *Kauffman* to "stand *only* for the proposition that *if* a government employee is hired in violation of the Personnel Act of Puerto Rico, he or she has no property interest in the position and, hence, no due process right to a hearing before discharge". So, to use *Kauffman* unreservedly to jury or non-jury trials should not be understood to imply that *Kauffman* applies to all spectrum of circumstances. Contrary to *Kauffman* also is the fact that the agency had a regulation which gave preference to internal employees. No such provision exists here. In our case, the record reveals that plaintiffs were substituted by persons who came from outside of FCC and no FCC employee ever complained about plaintiffs' appointments (App. F, *infra*, 67a-69a). The Court of Appeals' emphasis on "internal hiring preference", Op. at 20 (App. A, *infra*, 15a), is devoid of any evidentiary support; in fact, contrary to it. All the above shows that our case is substantially different from *Kauffman*, both in facts and law.

The problem with the *Kauffman* ruling is that it relies in case law that has never involved career-tenured employees. *Liliana Laboy v. E.L.A.*, 115 DPR 190 (1984), dealt with the recruitment of an employee without experience for the job in which other State Insurance Fund employees were not considered, all in violation of its own regulations, that provided for prior consideration of agency employees due to their experience and seniority (not a provision in FCC regulation); *Guerra v. Secretary of Social Services*, 113 DPR 50, dealt with trust em-

[9] Numerous reasons were shown to the First Circuit in our brief (App. G, *infra*, 75a-77a) that demonstrate the sharp contrasts between *Kauffman* and our case. To no avail.

ployees; *Colón v. Alcalde del Municipio de Ceiba*, 112 DPR 740, (strongly relied on in *Kauffman*), involved an employee who had not acquired a career status because his appointment was without competition, exam, registry of eligible, or a probationary period and plaintiff had knowledge—contrary to plaintiffs here—of these irregularities, *Colon, supra* at 742. And *Ortiz v. Alcalde de Aguadilla*, 107 DPR 819, dealt with a provisional employee that was named to a permanent position during a post-electionary period, in violation of law. Contrary to it all, a significant fact in our case makes them inapplicable: all six plaintiffs are legitimate career tenured employees, and a jury so found. The correct legal standard applicable here is expressed in the cases already discussed. Our research failed to reveal any case in which the First Circuit had an opportunity to consider them. We respectfully submit that consideration of these cases is imperative for a proper adjudication.[10] Since the legal question in our case has to do with whether or not Puerto Rico Law gave plaintiffs a sufficient property interest in their jobs as to invoke the protection of the Fourteenth Amendment, Op. at 21 (App. A, *infra*, 15a), then it is essential to consider and analyze cases like *Pierson Muller*, *Lupiañez* and *Soto*, *supra*, not considered by the Court of Appeals. The First Circuit in *Kauffman* at 1173 recognizes that "the law [P.R.] is not absolutely clear in regard to whether any property right associated with a career position is rendered null and void if a violation of the Personnel Act occurs". Since there is a clear line of cases that confer protected property status to government jobs in light of the circumstances by which employment was obtained, regardless of technical deficiencies in appointment (noted at district court level by J. Lafitte, the district judge in *Kauffman*, in *Santana Nieves v. Aponte Rogue*, DCO 88-066), the Court of Appeals cannot be so

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[10] The issue was fully briefed and resubmitted in rehearing to the First Circuit.

categorical on the Puerto Rico law as it was in this case. It misapprehended the long established rule expressed in *Pierson Muller*.

Another significant aspect in our case is that in FCC most of the managerial positions (31 of 37) had deficiencies in appointment,[11] according to audits and committee reports. Therefore, in order to be consistent with the reason to dismiss plaintiffs, all 31 employees had to be dismissed, including Mr. Rios (App. F, *infra*, 45a-46a), and even De Jesus himself (App. F, *infra*, 59a, 66a). But this is not what happened (in *Kauffman* all employees with deficient appointments were fired). Then, it is proper to ask: why the selective dismissals? The jury answered: because of political affiliation. Petitioners respectfully submit that reasonable persons could have reached this conclusion based on the record. Due process and first amendment rights were outright violated.

III.

In reversing, the First Circuit invaded the province of the jury, considering the credibility of witnesses, resolving conflicting testimony and weighing the evidence, all contrary to the Circuit's own well established standard. *Aurora Figueroa v. Aponte Rogue*, *supra* at 16; *Wagenman*, *supra*. And it did more; it ignored uncontradicted evidence offered by the opposing party (plaintiffs), something the First Circuit has said it cannot do. *Santiago-Negron*, *supra; Layne v. Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981). The Appeals Court disregarded the fundamental principle that there must be a minimum of interference with the jury. Our jury concluded that plaintiffs were legally hired and illegally dismissed. The Court of Appeals held that they were illegally hired and legally dismissed. That is an usurpation of the jury role that a court cannot do.

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[11] We reiterate that there were no deficiencies in plaintiffs' appointments, as the jury found.

CONCLUSION

The Opinion of the Court of Appeals, if allowed to stand, will prove to serve as a lethal weapon for the victimizers, and this Court will have promoted, not deterred, further constitutional deprivations. The purpose of § 1983 is broadly remedial and such statutes are liberally and beneficiently construed, *Owen* at 1408. The Court of Appeals departed from the teachings of this Court and ought to be reversed. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1977

MARGARITA RIVERA DE FELICIANO, ETC., *et al.*,
Plaintiffs-Appellees,

v.

FRANCISCO DE JESUS, ETC., *et al.*,
Defendants, Appellees.

FARM CREDIT CORPORATION,
Defendant, Appellant.

Appeal from the United States District Court
for the District of Puerto Rico
(Hon. Jose Antonio Fuste, *U.S. District Judge*)

Before
BREYER and SELYA, *Circuit Judges*,
and CAFFREY, *Senior District Judge.*

Carlos Del Valle with whom *Hon. Hector Rivera Cruz*, Secretary of Justice, *Hon. Rafael Ortez Carrion*, Solicitor General, *Jaime Brugueras* and *Ramirez & Ramirez* were on brief for appellant.

Ramon L. Walker Merino for plaintiffs.

April 27, 1989

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* Of the District of Massachusetts, sitting by designation.

BREYER, *Circuit Judge.* The plaintiffs in this case worked for Puerto Rico's Farm Credit Corporation ("FCC") as "career" civil service employees. In 1985, Francisco de Jesus, the President of the FCC, dismissed them. They sued de Jesus and the FCC, claiming that their dismissals were unlawful, for two reasons: (a) de Jesus fired them because of their political affiliation (they are all members of the New Progressive Party); and, (b) he fired them without the hearing to which they were entitled under the Fourteenth Amendment's due process clause. A jury found against plaintiffs in respect to their claims against de Jesus, but in their favor in respect to their claims against the FCC. The district court entered a judgment awarding them damages, back pay, and reinstatement. The FCC appeals, arguing that: (a) the jury's "political discrimination" verdict against the FCC cannot stand in light of the jury's verdict in favor of de Jesus; and (b) the plaintiffs have no constitutionally protected property interest in their jobs, because the FCC hired them unlawfully in the first place. They add that (c) the FCC, as an integral part of the Commonwealth's government, enjoys Eleventh Amendment immunity from liability for damages. We agree with the FCC in respect to the first two claims, so we need not reach the third.

I.

Background

The key facts include the following:

1. Between 1980 and 1984, the FCC hired all the plaintiffs.

2. During 1982 the commonwealth's Department of Agriculture began an audit of the FCC. In a 1982 report, the auditors said that FCC personnel decisions had been made improperly at the "management level," which fact had deprived the FCC's Personnel

Director of control over hiring. The report added that, as a result, "several recruitments, appointments and changes were made which go astray from the provisions contained in the Personnel Regulation" of the FCC. The report then gave several examples of improper hiring procedures.

3. In January 1985, the Popular Democratic Party's candidate became governor and Francisco de Jesus, a PDP member, became President of the FCC.

4. In February 1985, de Jesus saw both the 1982 audit report and a 1985 supplemental report. He appointed a committee to "evaluate everything referring to personnel files" of the FCC's 37 career employees. (The FCC employed about 120 people, 3 in "trust" positions, 37 in "career" positions, and 80 in "unionized" positions.)

5. In late February 1985, the committee reported back. It said that the FCC had hired 30 of its 37 career employees in violation of various personnel regulations. It listed the employees' names and the relevant violations; the list included all six plaintiffs.

6. In May and June 1985 de Jesus sent letters to the six plaintiffs, dismising them on the ground that the FCC had not legally hired them.

At trial, the plaintiffs presented evidence designed to show that, contrary to the committee's report, they had in fact taken examinations when applying for their jobs, and they had served probationary periods, as the personnel regulations required. They argued that, insofar as the FCC *did* violate its own personnel regulations when it hired them, the fault was that of the FCC's Personnel Director; it was not theirs. They added that de Jesus and the FCC, in any event, did not dismiss *everyone* who was hired illegally; instead, they dismissed only six persons, all of whom belonged to the NPP. De Jesus

denied any political motive. He said he had not known what political party the plaintiffs belonged to.

Ultimately, the jury found in de Jesus' favor on both the "political discrimination" and the "due process" claims. It found against the FCC on both claims. The FCC, before the court dismissed the jury, asked the court to "strike" the political discrimination verdict against it, in light of the verdict in de Jesus' favor. The district court decided that the verdicts for de Jesus but against the FCC were consistent. It decided that the evidence adequately supported the verdict against the FCC, and it denied the FCC's request. The FCC now appeals.

II.

The Political Discrimination Claim

The plaintiffs' political discrimination claim consists of their assertions that: (1) de Jesus, the President of the FCC, dismissed them because they belonged to the NPP; *and* (2) de Jesus, in doing so, was carrying out an official policy of the FCC. Both these assertions are legally necessary, for the Supreme Court has made clear that a government agency is liable for a deprivation of a constitutional right only where (1) a constitutional harm takes place, and (2) the "execution of a government's policy or custom . . . inflicts" that harm. *See Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694 (1978). In *Los Angeles* v. *Heller*, 475 U.S. 796 (1986), for example, the Supreme Court said that the district court correctly dismissed plaintiffs' claims against a city, because it could not be held liable for an injury that its police officers inflicted, despite proof of an unconstitutional city policy, after a jury had exonerated the individual police officers (in the first phase of a bifurcated trial). The Court wrote that

> neither *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal

> corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Id., 475 U.S. at 799; *see also City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 921 (1988). The FCC now argues, citing *Heller*, that the jury's finding in favor of de Jesus destroys an essential element of plaintiffs' case against the FCC, because that verdict means that *no one* dismissed plaintiffs because of their political affiliation, so no constitutional deprivation took place.

The basic question before us is whether, as a matter of logic and evidence, the jury's two verdicts are inconsistent. How could the jury have found that the FCC fired plaintiffs for political reasons, while also finding in favor of de Jesus? Obviously, in some political discrimination cases, jury verdicts of this sort could prove consistent. There may well be a basis for an agency's liability other than the conduct of the individual defendants that the jury exonerated. Alternatively, a verdict in an employee's favor might reflect the jury's belief that the employee, while acting pursuant to the agency's unlawful policy, nonetheless acted in good faith. *See Anderson* v. *Creighton*, 107 S. Ct. 3034, 3038-39 (1987) (discussing "qualified immunity" doctrine); *Figueroa-Rodríguez* v. *Aquino*, 863 F.2d 1037, 1043 & n.7 (1st Cir. 1988) (qualified immunity defense applies only to individual defendant, not to agency defendant). For example, in *Lincoln* v. *Board of Regents of University System*, 697 F.2d 928, 934-36 (11th Cir. 1983), the Eleventh Circuit reasoned that a judgment against a university Board of Regents was consistent with verdicts in favor of the two individual defendants, because the

jury could have based the Board's liability on the acts of another university official who was not named as a defendant. *See also Batista* v. *Rodriguez*, 702 F.2d 393, 396-99 (2d Cir. 1983) (jury found city liable, but exonerated individual police officer defendants; the court considered reconciling the verdicts by assuming the jury thought the police acted unlawfully but in good faith, but rejected that possibility for lack of proof that the police officers acted pursuant to city policy).

We cannot similarly reconcile the jury's findings, however, in this case. The jury could not have exonerated de Jesus on the basis of qualified immunity, because that issue was decided by the court in plaintiffs' favor, and did not reach the jury. And, the conduct of FCC officials other than de Jesus cannot support a finding that the FCC discriminated in dismising the plaintiffs. To establish an agency's liability, the plaintiffs must show that the discriminatory acts were done by persons with "final authority to establish [the agency's] policy with respect to the action ordered," *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986); *see also Praprotnik*, 108 S. Ct. at 926 ("authority to make . . . policy is necessarily the authority to make *final* policy"). In this case, the *only* person plaintiffs claimed to have such authority was de Jesus. The record contains no evidence that any other FCC officials—such as the Personnel Director or the Committee appointed to report to de Jesus on the personnel files—had final policymaking authority. And, it is not within the jury's power to "define for itself which officials' decisions should expose [the FCC] to liability." *Praprotnik*, 108 S. Ct. at 928. Thus, the only legally adequate basis for the FCC's liability was eliminated by the jury's verdict in favor of de Jesus.

Plaintiffs argue that the verdicts can be reconciled by assuming that the jury found that de Jesus did discriminate, but it exonerated him because it believed that he acted in his "official" capacity, not in his "personal"

capacity. The court's jury instructions, however, did not say that the jury could find only the FCC liable if de Jesus discriminated only in his "official" capacity. To the contrary, the district court told the jury

> if you find that political affiliation was the motivating factor for dismissing plaintiffs from their career positions, and if you find that if it were not for plaintiffs' political affiliation they would not have been terminated from their jobs, then you *must* find that the *defendants* [the only two defendants were de Jesus and FCC] violated plaintiffs' First Amendment rights and are potentially liable for damages.

(emphasis added). The instructions go on to repeat that the key question is whether "political affiliation was the motivating factor." The court added that

> If the claim of unconstitutional action by Mr. de Jesus, as president of the Farm Credit Corporation is to bind the Farm Credit Corporation, there must be proof that the acts of Mr. de Jesus were done pursuant to the policy of . . . the agencies of which he was the chief executive. That is, that the alleged unconstitutional conduct was more than an isolated act on the part of the president of the corporation.
>
> In other words, you must find that the alleged conduct was that of the president *and* the corporation he heads.
>
> In deciding this issue, consider the position and executive power of the president of the corporation, his role within the corporation itself, in the context of this case and whether he acted in his official capacity.

(emphasis added). A fair reading of these (apparently correct) instruction, taken together, is that, if the jury believes de Jesus discriminated, it is to find him liable, and that if it finds him liable it *may* also find the FCC

liable, but *only if* de Jesus acted pursuant to FCC policy. The only relevant reference in the jury instructions to "official capacity" is the quoted statement that the jury can take account of whether de Jesus acted in his "official capacity" when deciding whether he acted pursuant to "corporation policy." That statement is premised on the jury's having accepted the "claim of unconstitutional conduct by Mr. de Jesus." Nothing in the instructions even hints that the jury could find the FCC liable without finding de Jesus liable. We must assume that juries follow instructions, *see Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985), and that they do not "consider and base their decisions on legal questions with respect to which they are not charged," *Heller*, 475 U.S. at 798. The jury's verdict for de Jesus must mean that the jury found that his actions, in whatever capacity, did not constitute political discrimination. We therefore conclude that that appellant is correct; the record cannot support a judgment for de Jesus and a judgment against the FCC, on plaintiffs' claim of political discrimination.

The question of remedy remains. Normally, when a jury returns inconsistent verdicts, the trial court, prior to acepting the verdicts, should ask the jury to reconsider. *See Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir. 1982) (proper remedy for inconsistent verdicts is to allow the jury a chance to reconcile the inconsistency); *see also* Fed. R. Civ. P. 49(b) (when answers to special interrogatories are inconsistent, the court "shall return the jury for further consideration . . . or shall order a new trial"). In this case, however, the trial court, believing the verdicts consistent, did not do so. Instead, it accepted the verdicts and dismissed the jury. And now, we must either (a) order a new trial or (b) order judgment on the basis of the record in favor of the FCC. We believe the second alternative is the legally correct action for this court to take, for two reasons.

First, we cannot blame the district court's failure to send the jury back to reconsider any more on the defendants than on the plaintiffs. *Cf. Fernandez*, 681 F.2d at 58 (generally, the defendant must point out the inconsistency to the trial court before the jury is discharged, or else the issue is waived); *McIsaac* v. *Didriksen Fishing Corp.*, 809 F.2d 129, 134 (1st Cir. 1987). Here, the district court was fully aware of the potential inconsistency; indeed, it raised the issue itself, but then decided that the verdicts could be reconciled. The defense, not wishing to risk losing its favorable verdict for de Jesus, simply argued that the court should strike the verdict against the FCC. The plaintiffs, wishing to preserve their favorable verdict against the FCC, simply argued that the court should accept that verdict. Neither side sought resubmission of the case to the jury; nor, for that matter, has either side raised in this court the possibility of a new trial. Under these circumstances, it seems procedurally fair to decide the case according to the ground rules that counsel have set: if the verdicts are consistent, the plaintiffs win; if they are inconsistent, the FCC wins.

Second, we have examined how other appellate courts have dealt with roughly analogous "inconsistency" problems, such as where a jury returns verdicts in favor of an employee defendant, but against an employer whose liability was derivative of the employee's liability, and where, for some reason, the trial court does not resubmit the case to the jury. Most of the decisions favor granting judgment notwithstanding the verdict to the employer defendant. *See Batista*, 702 F.2d at 399 (in a § 1983 case, district court should have granted jnov for defendant city, because the jury had exonerated the individual defendants); *United Steelworkers of America* v. *O'Neal*, 437 So.2d 101, 103 (Ala. 1983) (verdict for employee "works an automatic acquittal" of employer, so employer is entitled to judgment); *Duke Trucking Co.* v. *Giles*, 366

S.E. 2d 216, 219 (Ga.App. 1988) (verdict for employee was a "legal verdict" but verdict against employer was "illegal and void," so trial court should have granted jnov for employer); *Young* v. *Cerniak*, 467 N.E.2d 1045, 1054 (Ill. App. 1984) (in general, a verdict finding only the employer liable "must be reversed as legally inconsistent"); *Burnett* v. *Griffith*, 739 S.W.2d 712, 715 (Mo. 1987) (en banc) (since "exoneration of an employee serves to exonerate the employer," court was required to give employer jnov; there was "no need for a new trial"); *Perry* v. *Costa*, 469 N.Y.S.2d 193, 194-95 (App.Div. 3d Dept. 1983) (since final judgment was entered in employee's favor, *res judicata* barred a new trial on employer's liability; judgment against employer reversed). Other cases, however, hold that the employer is entitled only to a new trial; and some of these cases set aside the verdicts as to both the employer and the employee, and order a new trial as to both defendants. *See Barnes* v. *West Point Foundry*, 441 F.2d 532, 533 (5th Cir. 1971) (ordering new trial as to employer because verdicts were inconsistent (employee defendant had been dismissed with prejudice)); *Estes* v. *Hancock County Bank*, 289 N.E.2d 728, 730 (Ind. 1972) (generally, proper remedy is to "overcome the jury's anomalous verdict by granting a new trial"); *McInturff* v. *White*, 565 S.W.2d 478, 480 (Tenn. 1976) (new trial ordered as to both defendants because "neither the verdict in favor of the employee nor the verdict against the employer can be permitted to stand").

Here, we would not order a new trial in respect to plaintiffs' claim against *de Jesus*, because plaintiffs have not appealed the judgment in de Jesus' favor. They have not asked for a new trial on their claim against him. Given the fact that the judgment in de Jesus' favor must stand, for us to order a new trial on plaintiffs' claim against the FCC would run counter to *Heller*, where the favorable verdict for the policeman barred trial on a

claim against the municipality. We conclude that, because the jury's finding that de Jesus inflicted no constitutional harm has become final and binding upon the plaintiffs, we should follow the apparent weight of authority, and hold that the FCC is entitled to a judgment in its favor.

III.

The Due Process Claim

The jury found that the FCC, in failing to give the plaintiffs a hearing before dismising them, deprived them of "property" without "due process of law," in violation of their Fourteenth Amendment rights. The FCC argues on appeal that the Fourteenth Amendment's guarantee does not apply to the plaintiffs, because the record shows that the plaintiffs did not possess any constitutionally protected "property" interest in their jobs. The FCC concedes that, ordinarily, a career civil service employee has a federally protected "property" interest in his job. *See Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 538 (1985) (employees may have "a property interest in continued employment" created and defined by state law). But, the FCC adds, plaintiffs were dismissed because they had never received a legally proper appointment to a career position. No one took "property" from them; they simply never received a "property" right in the first place. The FCC relies on our recent decision in *Kauffman* v. *Puerto Rico Telephone Co.*, 841 F.2d 1169, 1173-74 (1st Cir. 1988), as holding precisely in its favor.

In *Kauffman*, this court reviewed the dismissals of "career" employees whom the Telephone Company had initially hired without giving the general public notice of the job openings, without telling other eligible persons in the agency that they could apply for the jobs, and without honoring the agency's internal hiring preference. This court reviewed relevant Puerto Rico law on the question whether, in such circumstances, an employee has any

sort of legal entitlement to his job. The court concluded that

> under Puerto Rico law any property right associated with a career position is rendered null and void if a violation of the Personnel Act attends the filling of such a position.
>
> * * * *
>
> to the extent that the plaintiffs were hired in violation of [the agency's rules] they . . . could not, upon termination, benefit from the "property" status of [career] positions.

Id., 841 F.2d at 1173-74. The *Kauffman* court carefully distinguished *Loudermill*, in a discussion that we will not repeat here. *See Kauffman*, 841 F.2d at 1174-75. As far as we can tell, *Kauffman* is indistinguishable from the case before us.

The plaintiffs argue that *Kauffman* differs from this case in several relevant respects. First, they point out that *Kauffman* involved summary judgment, not a jury verdict. They are right, but we do not see how that fact helps them. We have applied *Kauffman* unreservedly, in the setting of a full jury trial. *See Santiago-Negron* v. *Castro-Davila*, 865 F.2d 431, 436-37 (1st Cir. 1989). And, the record here contains evidence, including the audit reports, the documents in plaintiffs' personnel files, and the Personnel Director's testimony, showing that the FCC hired plaintiffs without giving public notice of the job openings, without giving other FCC employees an opportunity to compete for the positions, and without creating a "registry" of eligible applicants. Plaintiffs introduced no contrary evidence. Article VII, §§ 2-5 of the FCC's Personnel Manual requires "public notice" of employment opportunities, "open competition" among applicants, and hiring from a "registry of eligibles." This is the same kind of hiring rule that was at issue in *Kauffman*, and the violations are also similar. Although

the plaintiffs here do not concede that their appointments violated the personnel regulations, here, as in *Kauffman*, they have failed to rebut the defendants' evidence on this point.

Second, plaintiffs point out that their claim of *political discharge* was supported by substantial evidence, and went to the jury, while the *Kauffman* plaintiffs' political discharge claim did not reach the jury. Again, the plaintiffs are correct, but we do not see the importance of this distinction in applying the *Kauffman* decision to plaintiffs' *due process* claim. Indeed, in *Santiago-Negron*, we applied *Kauffman* in a similar situation. *See id.*, 865 F.2d at 436-37.

Third, plaintiffs point out that the jury found, in response to a question on the special verdict form, that they were "career" employees. The jury did so, however, only after the court instructed them that:

> a career employee, *or somebody who appears to be a career employee* cannot be fired without just cause as per the law and the regulations which apply in this case. And in any event, some kind of hearing is mandatory
>
> * * * *
>
> . . . the law of Puerto Rico and the regulations which apply to personnel *and to these plaintiffs* create such an interest, such a property interest as to career employees.
>
> * * * *
>
> An individual who faces the deprivation of a property interest like the one the object of this suit must be given a hearing.

(emphasis added). These instructions may have suggested to the jury that, as a matter of law, they had to find that the plaintiffs were career employees. In any event, the record contains uncontradicted evidence that the plaintiffs were hired without the public notice and

open competition that the relevant regulations required. *See* Article VII, §§ 2-5, Farm Credit Corp. Personnel Manual. That fact makes the appointments unlawful and void as a matter of Commonwealth law. *See Kauffman*, 841 F.2d at 1173; *Colon* v. *Mayor of Municipality of Ceiba*, 112 D.P.R. 740, 12 Puerto Rico Supreme Court Official Translations 934, 940 (1982). The jury could not lawfully find to the contrary.

Fourth, plaintiffs point out that the panel in *Kauffman* rested its decision in part upon the district court's having reached a similar legal conclusion. The *Kauffman* panel noted that this court should be "reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in a state who is familiar with that state's law and practices." *Kauffman*, 841 F.2d at 1173 (quoting *Rose* v. *Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982)). The plaintiffs go on to point out that a district court judge, knowledgeable about Commonwealth law, reached a contrary legal conclusion in this case. In our view, however, the reasoning of the *Kauffman* opinion indicates that the panel would have reached the same result even if the district court had disagreed. Besides, here, another district court judge in Puerto Rico has reached the opposite conclusion in a case brought by other FCC employees against the same defendants. *See Arbona Custodio* v. *De Jesus Gotay*, 678 F. Supp. 40, 43-45 (D.P.R. 1988) (FCC employees appointed "without affording other employees . . any consideration for the positions available and without advertising the position openings" had "no right to due process prior to termination," because "an appointment to public employment effectuated contrary to the pertinent legal and regulatory disposition does not breed a property right in said position"), *aff'd mem.* (1st Cir. March 15, 1989).

Fifth, plaintiffs point out that *Kauffman* involved a violation of an "internal hiring preference" regulation,

as well as regulations, like those at issue here, requiring public notice of vacancies and open competition. We do not see why this should make a difference. As in *Kauffman*, the basic purpose of the personnel regulations involved in this case is to encourage open competition and selection of the most qualified candidate from a pool of applicants, that is, to carry out the merit principle in civil service hiring. *See Kauffman*, 841 F.2d at 1174 (purpose of vacancy notices and internal hiring preference is to further the merit principle). Hence, the court reasoned in *Kauffman* that an appointment bypassing the regulations is an act "contrary to laws and regulations furthering the underlying values of the Personnel Act," *id.*, and is null and void. This reasoning applies with equal force to the case now before us.

Finally, plaintiffs argue that any failure to abide by the rules when they were hired was not their fault, but the fault of the FCC. That may well be so, but the legal question has nothing to do with fault. It has to do with whether or not Puerto Rico law gave the plaintiffs a sufficient "property" interest in their jobs as to invoke the protection of the Fourteenth Amendment. We can find no significant difference between *Kauffman* and this case. That being so, we must reach the same conclusion. *Plaintiffs did not show sufficient "property" interest in their jobs*; hence, their jobs did not fall within the scope of the Fourteenth Amendment's protection of "property" rights. *See Kauffman*, 841 F.2d at 1173-75. Thus, the FCC did not violate their due process rights when it failed to give them a hearing.

For these reasons, the judgment of the district court is

Reversed.

Corrected Copy

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1977

MARGARITA RIVERA DE FELICIANO, ETC., *et al.*,
Plaintiffs, Appellees,

v.

FRANCISCO DE JESUS, ETC., *et al.*,
Defendants, Appellees,

FARM CREDIT CORPORATION,
Defendant, Appellant.

JUDGMENT

Entered: April 27, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

> The verdict of the jury only as to the FCC is set aside and the judgment of the district court only as to the FCC is reversed in accordance with the opinion issued this date.
>
> No Costs.

By the Court:

/s/ [Illegible]
Clerk

[cc: Messrs: Del Valle and Walker Merino]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1977

MARGARITA RIVERA DE FELICIANO, ETC., *et al.*,
Plaintiffs, Appellees,

v.

FRANCISCO DE JESUS, ETC., *et al.*,
Defendants, Appellees,

FARM CREDIT CORPORATION,
Defendant, Appellant.

Before
BREYER and SELYA, *Circuit Judges*
and CAFFREY,* *Senior District Judge.*

MEMORANDUM AND ORDER

Entered: May 24, 1989

Since counsel for appellees states in his petition for rehearing that the "inconsistency issue has taken us by total surprise," we wish to point out the following:

1. Appellants, in making their second argument in their initial brief, wrote:

---

* Of the District of Massachusetts, sitting by designation.

> Farm Credit liability in this case is exclusively predicated on the conduct of defendant de Jesus, whom the jury exonerated for that very same conduct . . . . Hence, since de Jesus' conduct was not constitutionally tortious, as determined by the jury, it cannot constitute an unconstitutional policy . . . . Therefore, in light of the verdict exonerating de Jesus, and the specific jury charge on Farm Credit's liability, the court's decision imposing liability on Farm Credit is contrary to well-established constitutional doctrines . . . .

2. Appellees may believe that it is not appropriate to characterize the legal problem this argument raises as one of "verdict inconsistency." Yet, we believe that is the proper legal characterization; it is a characterization that seemed to work in appellees' favor, not against them (or, was, at least, neutral); and a member of the panel specifically raised the matter at oral argument.

3. For the reasons mentioned in the opinion, though we found that appellant did not want the matter resubmitted to the jury, that fact, in the circumstances, did not constitute a "waiver" preventing appellant from making its second argument on appeal, nor did it make it unfair, or otherwise inappropriate for us to consider that argument.

While we recognize that the case, on appeal, presented close and difficult issues, we considered the arguments raised and discussed them in our opinion. We can find no significant new argument, not previously considered, in the petition for rehearing.

The petition for rehearing is, therefore,

Denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs: Del Valle and Walker Merino]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1977

MARGARITA RIVERA DE FELICIANO, ETC., *et al.*,
Plaintiffs, Appellees,

v.

FRANCISCO DE JESUS, ETC., *et al.*,
Defendants, Appellees,

FARM CREDIT CORPORATION,
Defendant, Appellant.

Before
CAMPBELL, *Chief Judge*,
BOWNES, BREYER, TORRUELLA and SELYA, *Circuit Judges.*

ORDER OF COURT

Entered: May 24, 1989

The panel of judges that rendered the decision in this case having denied the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs: Del Valle and Walker Merino]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 85-1731 (JAF)

MARGARITA RIVERA DE FELICIANO; ORLANDO ORTIZ; EVELYN MIRANDA; ZENAIDA VALENTIN; MODESTO MELENDEZ; JOSE L. VALLINES, *Plaintiffs*,

v.

FRANCISCO DE JESUS GOTAY and
THE FARM CREDIT CORPORATION,
Defendants.

ORDER

As a result of the verdict rendered by the jury on July 20, 1988, we find no reason to preclude corporate liability of the Farm Credit Corporation because an agent or officer, Mr. Francisco de Jesus Gotay, was exonerated by the jury of violating plaintiffs' civil rights.

In the first place, corporate responsibility under 42 U.S.C. sec. 1983 may not be based upon a *respondeat superior* or vicarious liability theory. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982); *White v. Washington Public Power Supply System*, 692 F.2d 1286, 1290 (9th Cir. 1982); *Landrigan v. City of Warwick*, 628 F.2d 736, 746 (1st Cir. 1980). In other words, a public corporation's responsibility is grounded in something other than the actions of its employees—especially, it is based on the

existence of "an official policy or custom of discrimination." *White*, 692 F.2d at 1289. *See also Monell*, 436 U.S. 658 (1978); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820-24 (1985) (liability of municipalities).

We need not speculate in much detail on the motivation behind the jury's decision to find the corporation, but not its president, liable. With the evidence contained in this record, a jury could quite reasonably determine that it was the corporation's policy and not the action of its defendant officer, that caused the harm to plaintiffs. The president of the corporation must not commit a constitutional violation in order to enable plaintiffs to recover from the Farm Credit Corporation.

This brief analysis applies to both the injunctive relief to be entered by the court and the compensatory damages awarded by the jury.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of July, 1988.

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 85-1731 (JAF)

MARGARITA RIVERA DE FELICIANO; ORLANDO ORTIZ ROURA; EVELYN MIRANDA; ZENAIDA VALENTIN; MODESTO MELENDEZ; JOSE L. VALLINES,

Plaintiffs,

v.

FRANCISCO DE JESUS GOTAY and
THE FARM CREDIT CORPORATION,

Defendants.

JUDGMENT

Based on the verdict rendered by the jury in this case on July 20, 1988, judgment is hereby entered as follows:

Judgment is hereby entered for the plaintiffs mentioned in the caption of this judgment and against the Farm Credit Corporation, reinstating said plaintiffs to the following outlined positions, with back pay from May 17, 1985 until the actual date of reinstatement.

Name	Position
Margarita Rivera de Feliciano	Administrative Assistant, Farm Credit Corporation
Orlando Ortiz Roura	Assistant Vice President (Chief Agronomist in Charge of Farm Credit), Farm Credit Corporation
Evelyn Miranda	Administrative Secretary II, Farm Credit Corporation
Zenaida Valentín	Special Assistant, Legal Department Farm Credit Corporation
Modesto Meléndez	Regional Manager, San Juan, Farm Credit Corporation
José L. Vallines	First Vice President in Charge of Farm Credit, Farm Credit Corporation

The positions mentioned herein are all career, tenured positions within the Farm Credit Corporation.

The Farm Credit Corporation, its employees, agents, servants, and attorneys, will make effective the payment of the back pay award which forms part of the injunctive relief granted by the court on or before August 26, 1988, at Noon: The back pay will include the salary and the fringe benefits they would otherwise be earning and receiving but for their discharge from the tenure, career positions. The monies for the payment of the back pay award will be deposited with the Clerk of this court.

The reinstatement to the career, tenured positions mentioned above will take place not later than August 8, 1988, at 8:30 A.M. The reinstatement will be to the positions mentioned in this judgment.

The injunctive relief does not cover the damages assessed by the jury. Notwithstanding, judgment is also entered on behalf of the plaintiffs and against the defendant, Farm Credit Corporation, for compensatory damages as follows:

Name	Amount
Margarita Rivera de Feliciano	$60,000.00
Orlando Ortiz Roura	$60,000.00
Evelyn Miranda	$60,000.00
Zenaida Valentín	$80,000.00
Modesto Meléndez	$60,000.00
José L. Vallines	$60,000.00

Judgment is also entered stating that, as per jury verdict, the Farm Credit Corporation's conduct was malicious, oppressive or intentional, even though no punitive damages were assessed in monetary terms.

Furthermore, judgment is hereby entered on the directed verdict granted by the court dismissing the complaint as to Antonio Gonzalez Chapel, Secretary of Agri-

culture, Commonwealth of Puerto Rico. In turn, judgment is hereby entered as per jury verdict, dismissing the complaint as to Francisco de Jesus Gotay.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of July, 1988.

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 88-8055

MARGARITA RIVERA DE FELICIANO, *et al.*,
Plaintiffs, Appellees,

v.

FARM CREDIT CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Entered August 26, 1988

Defendant Farm Credit Corporation ("FCC") has filed a motion to stay injunctive relief. While at this preliminary stage we do not know all the details of the matter, we are troubled by the district court's order that the FCC deposit with the clerk of the district court monies for the payment of the district court's back-pay award, pending a decision on the FCC's motion for judgment notwithstanding the verdict and pending appeal to this court, in light of the Eleventh Amendment questions raised by the FCC. Accordingly, we hereby stay the district court's back-pay order pending further order of this court. Plaintiffs are directed to file a response to

defendant's motion to stay injunctive relief on or before 5 p.m. on September 9, 1988.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

By: /s/ Daniel F. Loughry
Chief Deputy Clerk

[Cert. cc: Judge Fuste and Clerk, U.S.D.C. of Puerto Rico, Messrs: Ortiz Velez, Wallser Merino and Ms. Carrero]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 88-8055

MARGARITA RIVERA DE FELICIANO, *et al.*,
Plaintiffs, Appellees,

v.

FARM CREDIT CORPORATION,
Defendant, Appellant.

No. 88-1977

MARGARITA RIVERA DE FELICIANO, ETC., *et al.*,
Plaintiffs, Appellees,

v.

FRANCISCO DE JESUS, ETC., *et al.*,
Defendants, Appellees,

FARM CREDIT CORPORATION,
Defendant, Appellant.

Before

CAMPBELL, *Chief Judge,*
BREYER and TORRUELLA, *Circuit Judges.*

ORDER OF COURT

Entered October 31, 1988

Defendant-appellant Farm Credit Corporation ("FCC") has responded to this court's order to show cause why the appeal in No. 88-1977 should not be dis-

missed for lack of jurisdiction. Appellant also has filed a motion to stay injunctive relief. (No. 88-8055).

Appellant's appeal in No. 88-1977 may proceed in the normal course. Plaintiff's July 28, 1988 request for amended judgment *nunc pro tunc* constitutes a motion under Fed.R.Civ.P. 60(a) to correct a clerical mistake in the district court's judgment, not a Fed.R.Civ.P. 59(e) motion. Accordingly, the motion does not toll the time for filing a notice of appeal under Fed.R.App.P. 4(a)(4). Appellant's August 18, 1988 motion for judgment notwithstanding the verdict also does not toll the time for appeal under Fed.R.App.P. 4(a)(4) because it was not timely in that it was filed more than ten days after entry of the district court's judgment on August 2, 1988.

Turning to appellant's motion to stay injunctive relief, appellant's appeal in No. 88-1977 raises substantial issues under the Eleventh Amendment for this court's determination. Consequently, the motion is granted. The district court's July 26, 1988 *back pay order is hereby stayed* pending disposition of the appeal.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

By: /s/ DANIEL F. LOUGHRY
Chief Deputy Clerk

[cc: Messrs. Brugueras, Merino and Celez, Hernandez, Carreno]

APPENDIX E

Corrected Copy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 85-1731 (JAF)

MARGARITA RIVERA DE FELICIANO, ORLANDO ORTIZ, EVELYN MIRANDA, ZENAIDA VALENTIN, MODESTO MELENDEZ, JOSE L. VALLINES, *Plaintiffs*,

vs.

FRANCISCO DE JESUS GOTAY and
THE FARM CREDIT CORPORATION,
Defendants.

JURY VERDICT

We, the Jury, find as follows:

1. We find, by a preponderance of the evidence, that the employee or employees listed below were or were not carer employees:

Name	Career Status
Margarita Rivera de Feliciano	YES
Orlando Ortiz	YES
Evelyn Miranda	YES
Zenaida Valentín	YES
Modesto Meléndez	YES
José L. Vallines	YES

Note: Answer this question by inserting a "YES" or "NO" under the column "Career Status."

2. We find, by a preponderance of the evidence, that the employees listed below were or were not given a pre-termination hearing to present their side of the story.

Name	Was a Hearing Given?
Margarita Rivera de Feliciano	NO
Orlando Ortiz	NO
Evelyn Miranda	NO
Zenaida Valentín	NO
Modesto Meléndez	NO
José L. Vallines	NO

Note: Answer this question by insernting a "YES" or "NO" under the column "Was a Hearing Given?"

3. Do you find that the plaintiffs' dismissals were the result of political discrimination because of their party affiliation?

Name	YES OR NO
Margarita Rivera de Feliciano	YES
Orlando Ortiz	YES
Evelyn Miranda	YES
Zenaida Valentín	YES
Modesto Meléndez	YES
José L. Vallines	YES

Note: Insert a "YES" or "NO" next to the name of each plaintiff.

4. If you find that these employees were career employees and that no pre-termination hearing was afforded, (Questions 1 and 2, this verdict), OR that they were dismissed because of their political affiliation, (Question 3, this verdict), then assess the compensatory damages, if any, that you find for each plaintiff.

Name	Amount
Margarita Rivera de Feliciano	$60,000.00
Orlando Ortiz	60,000.00
Evelyn Miranda	80,000.00
Zenaida Valentín	60,000.00
Modesto Meléndez	60,000.00
José L. Vallines	60,000.00

5. Which defendants do you find liable?

Name	
Francisco de Jesus Gotay	
The Farm Credit Corporation	X

Note: Place and "X" next to the party of parties that you find liable.

6. Do you find that the defendant's conduct was malicius, oppressive or intentional? ANSWER YES OR NO.

YES

7. Which defendants do you find liable for such malicious, oppressive or intentional conduct?

Name	
Francisco de Jesus Gotay	
The Farm Credit Corporation	X

Note: Place and "X" next to the party or parties that you find liable for such conduct.

8. If you answer the last question in the affirmative, then assess the punitive damages, if any, that you find for each plaintiff.

Name	Amount
Margarita Rivera de Feliciano	0
Orlando Ortiz	0
Evelyn Miranda	0
Zenaida Valentín	0
Modesto Meléndez	0
José L. Vallines	0

In San Juan, Puerto Rico this 20th day of July, 1988.

/s/ Marcilly Colon
Foreperson

APPENDIX F

TRANSCRIPT EXCERPTS

* * * *

[155] And then I went to talk to Mr. Fransisco De Jesus.

He told me he wasn't going to sign it, and I told him, "But, Mr. De Jesus, I am the only one, because all the employees have a right to seek loans from the association." And he had always signed them witnout any objections.

Then I asked him why he was doing that to me and he said that he couldn't sign it because I was going to be fired.

When he told me that, my whole world fell to pieces, because I was, he was telling me that I was going to be fired without having committed any sin.

"Neither you nor Vallines nor Margarita nor any other NPP. I wouldn't sign because they were all going to be dismissed."

THE COURT: I would not sign.

THE WITNESS: I would not sign. And then they won't be able to pay it.

THE COURT: Wait, we missed something there. What she said is, "Referring to these three persons, Margarita, Vallines and herself, "I will not sign the papers inasmuch as you are going to be dismissed and thereafter you won't be able to pay." That is what she said. Okay?

THE WITNESS: And then I complained to him, asking him for the reasons why he did that, and he told me, "You are a NPP. And the information I have says that you belong to a committee which collects money for the New Progressive [156] Party."

Then I felt completely destroyed. And I told him, "Mr. De Jesus, you know I am a good employee. You told me yourself, many times. You know me since we worked in

Caguas together many years ago and you know that for me work has always been above politics. Why do you come—that is, I don't deserve this treatment."

Then he told me that he knows my father. My father is a Popular and he cooperates with the Popular Party. He is well known in all Puerto Rico.

Q (By Mr. Walker) What is his name?

A Luis Miranda.

My family is Popular.

Then he told me if I could get the political endorsements from leaders of the Democratic Popular Party he would see what he could do.

Then I told him, "How can I get that?" And he said again, "Well, maybe if you talk to your father. Because you know that he has always worked together with the Popular Party. As a matter of fact, he participated in the governor's assumption of office and at the peoples festival."

So I told him I would talk to him and see what could be done.

And I went on complaining to him, because although he said if I could get some endorsements he might help me, I was [157] unable to accept that because I had committed no sin. I had already spent 20 years in the government and he was going to ruin them that way. I just didn't deserve it.

On seeing his attitude, I told him that I would take measures.

And then I went and talked with my father.

When I got home, I arrived completely destroyed. I plunked myself down on my bed to weep and explained the situation, what Mr. De Jesus had told me; that if my father took some measures—he told me he would help me, make some steps.

One he spoke to, the chairman of the Popular Party in the community. He spoke with the representative Juan Corujo Collado, and with representative Juan Lopez

Hernandez. And each one of them gave him the political endorsements which Mr. De Jesus asked of me.

MR. WALKER: Can the witness be shown exhibits 31 through 34, your Honor?

THE COURT: Are these the endorsements that you just referred to?

THE WITNESS: Yes, sir.

THE COURT: And you sent them to Mr. De Jesus; is that right?

THE WITNESS: On May 13th I went to Mr. De Jesus' office to give him the endorsements. When I arrived he was [158] busy with a visitor. So I spoke with his secretary, Mrs. Lolita Cancel.

And then I told her that I was going to hand in the documents that Mr. De Jesus had asked for. And that as he was busy, whether she could please give me a receipt for those documents.

As I took copies and originals with me, she said, "Evelyn, can you make a copy and give to me and I will give you a receipt." And I said, "Okay." And she signed it for me, thus, giving me a receipt.

While I was there she kept the originals to give to Mr. De Jesus while I kept the copies.

At that moment the visitor who had been with Mr. Fransisco De Jesus came out and then I asked her to give me the letters so that I can give them to him personally. And when she saw me he asked me to come in.

I told him that I had gone to take him the letter, the endorsements he had asked for. Then he checked them and read all of them.

And then he told me that, "Everything is fine, Evelyn, everything is wonderful. Leave them here and drop in again in two or three days."

This was around May 10th.

On May 13th, when I went to his office, I find him changed. He seemed annoyed.

[159] And then he tells me, I explained that I am going there to find out what happened with my request,

after having taken the endorsements. Then he was in a bad mood, he was annoyed. He told me that he was upset because I had asked for his secretarie's signature. And that compromised him politically. And he even called me a cheat because I had cheated him.

MR. WALKER: Excuse me your Honor, I don't believe that would be the proper translation.

THE COURT: Why don't you check the word. It is not cheat. In the context it is like take advantage of, impose on. It is like taking advantage of someone.

MR. WALKER: Yes, your Honor.

THE WITNESS: Well, he said that I had imposed on him.

THE COURT: That is okay.

THE WITNESS: That that compromised him a great deal; that he was taking steps to see what he could do with me if he would find me a position, but that now I should forget all the help which he had offered me.

Because he had offered to help me find another job but that was under condition of the endorsements. But now that I should forget about any kind of help and that I should seek help from the leaders of my party, the New Progressive Party.

At that moment I felt even more destroyed because I had [160] gone there with hope. And after he had told me that I had taken advantage of him, which is very distant from my principles, because I have always been a very upright person, and I found that he was punishing me.

So I asked him why was he punishing me that way. If he had found nothing wrong with me, as a matter of fact, he had often told me I was a good employee. As a matter of fact, often, when his secretary was on vacation or didn't go to work, he asked for my services and I gladly helped him.

Q (By Mr. Walker) I asked you, ma'am, I ask you, you are, everything that you have testified up to now,

you are aware that you are testifying it under oath, to the members of the jury and to this Court?

A Yes, sir.

Q What was the end result, after the meeting of May 13th, what is the next thing that happened to you?

A Well, after the meeting he told me that as I was asking for rights which I had, I told him that I would see what steps I could take; that I would have to consult it legally. Because it couldn't be the way he said it, because I was an employee with almost 20 years service in Puerto Rican Government.

He told me to go wherever I pleased.

* * * *

[167] A Well, that caused such great anguish to have to go through all those things to which I was not accustomed. I had to go to unemployment. I had to go to food stamps. When I was accustomed to paying my own expenses.

Well, that destroyed me emotionally, because, while it is I come from a family with little wealth, and I always helped my mother, even if it was only a little bit. And I couldn't do it any more as I had done before.

Q I ask you, ma'am, even though you have a job today, will you go back to the former job from which you were terminated?

A If I had a chance to do so, yes.

Q Why?

A Because I have always enjoyed working and I liked working at the corporation. I felt very good serving the people of Puerto Rico, especially the farmers, serving the Farm Credit Corporation.

In addition, I have some very good colleagues and I have the best intentions to work as before if I got a chance to do so. To return, well I would accept.

Q Okay.

MR. WALKER: I have no further questions. Thank you very much.

THE COURT: May I see those exhibits you have?

Are you sure that, are you sure that Mr. De Jesus [168] told you that if you would get endorsements from prominent members of the Popular Party you could keep your job?

THE WITNESS: Yes, sir.

THE COURT: Was somebody else present when he said this?

THE WITNESS: Once he called his secretary to tell her that he was asking me for some documents and that if he wasn't in when I came, that I should give them to her.

THE COURT: And your father was the one who obtained these three letters from Juan Lopez Herandez. Francisco Marco and Juan Luco Saso?

THE WITNESS: Yes, sir.

THE COURT: And if we called your father he could tell us the same thing.

THE WITNESS: Yes, sir.

THE COURT: Okay. And Larita Cancel was Mr. De Jesus' secretary, the one that received the papers.

THE WITNESS: Yes, sir.

THE COURT: Okay. Very well. We are going to excuse you for the day.

* * * *

[199] Q Did the dismissal take you by surprise?

A No, it didn't surprise me, but it hurt me.

Q Why didn't it surprise you?

A Before this layoff, this dismissal, already the Farm Credit Corporation, I had already been indirectly told I was going to be laid off.

Q Tell the members of the jury how was that.

A In November to January of '85, when the Popular Democratic Party wins the elections, I shared an office with Mrs. Madaline De Davila, who is the sister-in-law of Mrs. Carmen Sonja Zayas, who is the secretary of the Social Services Department.

And in that office a list had been drawn up for people who were going to be laid off.

Q I ask you, did you ever see that list?

A Yes, sir.

Q Can you tell the members of the jury any of the names that you may remember from that list?

A Yes, sir. Mr. Jose Luis Vallines was there; Margarita Rivera; Evelyn Miranda, Modesto Melendez, Orlando Ortiz Roura, your servant, and others whose names I can't recall.

Q But the list consisted of other persons than names [200] consisted in this case.

A That is correct.

Q Did you ever question Mrs. Madaline Colon about the list?

A Yes.

Q Before you tell us what she told you—wait, tell the members of the jury what personal relationship did you have with her.

A A very intimate and personal relationship. She had been my friend for a long time.

Q And what happened?

MR. BLANCO: Objection, sir.

THE COURT: I have to sustain that part.

Q (By Mr. Walker) Don't tell us what she told you. Tell us, as a result of what she told you, what happened.

A Everybody on the list was laid off.

Q Ma'am, prior to the receipt of that letter, I ask you if you had ever been notified of the fact that an evaluation of your personnel file was being performed?

A No, sir.

Q Prior to the receipt of that letter, had you ever been notified that any charges were pending against you leading to dismissal?

A No, sir.

* * * *

[402] I think it is beyond doubt in this case, your Honor, that plaintiffs had a clearly established right to at least due process of law. Mainly because there were tenured career regular employee's within the corporation.

By the terms of their own regulations and by the terms of law.

Now, as I understand their argument, your Honor, they sit back on the allegation that the initial process was not done. The notices and the Registry of Eligibles.

What has transpired so far in the testimony of the witnesses is they had no control over that. Who—the person that has control over that is the personnel director. If a notice is going to be placed, that is his duty, not the plaintiffs'. If a Register of Eligibles is going be to made, that is his duty, not the plaintiffs'.

But as I understand their argument, because that wasn't done, plaintiffs cannot claim a property interest because their appointment was supposedly not abinito; because it did not comply squarely with the regulation.

Therefore, they had no tenure; therefore, there was no due process to be given to them; therefore, they could be terminated at whim.

[403] Well, I think their argument falls on its face, your Honor. For two reasons.

Mere technicalities in the appointment are not decisive whether an appointment is null and void, abinito.

The *Colon* case law, the *Bessie Kaufman* position, if your Honor looks at it, will see that in any of those cases it dealt with tenured career employees.

The *Colon* case of the Supreme Court of Puerto Rico was a trust employee who he admittedly knew he had no tenure; he did not approve a probationary period; he did not comply with the Registry of Eligibles and he, the employee, had personal knowledge of that.

Under that set of circumstances, your Honor, is that the Supreme Court states that an appointment of that nature is null and void, abinito.

Now, there is also case law, by the Supreme Court of Puerto Rico, that establishes, based on cases by the Supreme Court of the United States, that an expectancy in employment and continuity of employment can also be given to an employee, mainly a public employee, by the circumstances by which that employee comes and gets the job.

And this, allow me, your Honor, just to briefly cite you the case law that I am referring to.

There is a decision of the *Department of Natural Resources v. Correa*, by the Supreme Court of Puerto Rico, [404] April 15, 1987, 87 JTS 35.

This decision, your Honor, the Supreme Court regulates what it has been long said, and allow me to just read just to phrase this. "A public employee has a recognized interest in retention of employment if that interest is protected by law or," and I emphasize the "or", your Honor, "when the circumstances of employment creating him the expectancy of continuity."

Now, in this very same case, your Honor, the employee requested, claimed that because of the circumstances of employment, she had a right of continuity. And that argument is rejected by the Supreme Court because the Supreme Court understood that her understanding was a unilateral understanding. And upon rejecting that part of the argument, the Supreme Court said that the simple offer of a job is not enough. It requires the expectancy and continuation; requires certain acts from the agencies which, unequivocal evidence and agreement, to make an offer a reality.

Now, if we analyze, your Honor, the facts of this case and the testimony as given by each one of the plaintiffs, by all six, I think it would be fair to say, your Honor, that they had a legitimate expectancy in employment when they came into the Farm Credit Corporation.

They have clearly testified how they found out about the position. How they applied. How they were [405]

interviewed and their credentials evaluated by the president and by the personnel director.

Express manifestations by the personnel director as to the fact that they qualified.

And after that, they approved probationary period and by law and regulation that implies you obtain a permanent status.

I think that is more than sufficient for the purpose any reasonable employee to understand that they have a property interest. And that is the property interest, your Honor, that even if for some technecality the appointment may be wrong, that is a property interest that also is protected by due process of law. And that is clear.

As recent as *Chevaras Bacheco v. Revera Gonzoloz*, a decision by the Court of appeals of the First Circuit of January 13, 1987, your Honor, remember this, that I am telling you specifically at page three it says, "property interest may be created, however, not only by explicit contract with provisions but also by an implied contract or officially sanctioned rules of the work place." Citing *Perry v. Cinderman.*

What I am trying to tell the Court, your Honor, that their argument falls, because it falls short of the analysis, regardless of the fact that there may have been, and that is their burden to prove, that there may have been [406] some techincal problems with the appointments; they have not analyzed the fact of the expectancy of the employee who has nothing to do with the problems they have.

It was not their duty to find a notice or to be part of a Registry of Eligibles. And they all approved probationary periods, your Honor.

That is the failure in the government's argument with respect to the qualified immunity and whether there had to be due process of law or not.

I respectfully hit to the core, there is a property interest here, very well found and once that is established

there is a due process of law that has to be followed and had to be followed by Mr. De Jesus.

Exhibit No. 1, your Honor, plaintiffs', is a normative letter sent on May 1, 1985, precisely. It is a normative letter sent by the personnel system of Puerto Rico to all the head agencies and all the presidents of corporations of the government of Puerto Rico which delineates, your Honor, the procedure to be followed in accordance with the *Loudermill* ruling.

They are being told, "Listen, if you are going to dismiss someone you have to follow this." And that was given to this man two weeks before he fired in—the manner that he fired the employees.

I do not think he can seriously argue to this Court [407] that there was not an clearly established right for due process.

By the same token, your Honor, on the, on the political descrimination claim, I do not think he can clearly argue to this Court that there is a sacred protected right not to be dismissed from employment because of your political affiliations. Regardless of the fact whether you have tenure or not. That is a, something that protects every employee. And I think, your Honor, the evidence so far is clear and abundant as to the fact that the political motivation was the primary, if not the only reason for this decision.

So far, your Honor, with respect to the qualified immunity, let me briefly address the court with respect for the Eleventh Amendment claim they make in favor of the Farm Credit Corporation.

The rules and decision that they rely on, when the Court has an opportunity to examine it, if you have not done it yet, already, your Honor, which I know you must have, because you read—you will see, your Honor, that the incorporation of the Farm Credit Corporation, in the decision, it is a mere dictum. And it is a mere dictum.

Because at first, at foot note number one of that decision the Court states that prior to rendering that opinion, plaintiffs had dismissed, voluntarily, their com-

plaint against the Farm Credit Corporation.
[408] So, at the time—

THE COURT: Let's not even get into that because I already decided that point and I am not going change my view.

MR. WALKER: Your Honor, let me then ask you if there is any other point that you deem necessary for me to argue.

THE COURT: No.

MR. WALKER: Thank you.

THE COURT: This is the ruling by the Court: I am going to grant the motion under Rule 50 as to Mr. Chapel because there is no evidence in this case linking him to the discriminatory acts which are objects of the suit. Judgment of dismissing the complaint as to him will be entered by the Court, on the basis of the directed verdict.

On the issue of Eleventh Amendment; I decided that issue back in July of 1987 in this particular case. I refer the record to my order, opinion order of July 20, 1987, document number 32 in this record. I analyzed what I thought were the pertinent factors at the time to decide whether the corporation was entitled to Eleventh Amendment considerations or not and I decided against the corporation and I do not intend to change my view at this time.

* * * *

[506] MR. WALKER: I am sorry, your Honor.

THE COURT: Ask him a question.

Q (By Mr. Walker) Tell me, sir, if it is true or not that in the same section of the trial, that three evaluations of the probationary period performed to Mr. Evelyn Miranda appear in that file. The originals.

A That is correct, it seems.

Q Didn't you see them in 1985 when you performed that evaluation, sir?

A Yes, I saw them.

Q And you have been the custodian of that record since then?

A That is right.

MR. WALKER: Thank you, sir.

For the sake of brevity, your Honor, I had number 90 as Mr. Ortiz's personnel file.

Q (By Mr. Walker) Isn't it also true, sir, that in the case of Mr. Orlando Ortiz Roura, you also reached the conclusion and finding that he had not approved a probationary period; is that correct?

A It is pointed out in paragraph D.

THE COURT: That he did not complete it. The question is according to the report did he complete or—What happened to the report?

A For our purposes, the committee, on evaluating both [507] files, we found that there had been subjected to three month probationary period; that that was not the practice for the corporation's management personnel.

MR. WALKER: If I may be allowed, your Honor.

THE COURT: The question is, that in your report it says that there was no probationary period; is that right?

THE WITNESS: It is inferred that no probationary period was carried out pursuant to the corporation's regulations or the corporation's practices.

THE COURT: Let me see your report.

MR. WALKER: It is the same in all cases, your Honor.

THE COURT: Mr. Rios, when I ask you a question, from now on, you tell me exactly what I ask you.

Isn't it a fact that D(3) says, "The incumbent was not the object of a probationary period as established in the regulations?" That is all it says. Is that what it says?

THE WITNESS: That is right.

THE COURT: No if's, no but's. That is what it says there, is that right?

THE WITNESS: Yes.

THE COURT: Okay. Question.

Q (By Mr. Walker) Isn't it a fact, sir, that in that personnel file, that three evaluations performed to Mr. Orlando Ortiz Roura, the originals, appear in that file, sir?

[508] A I didn't, they appear.

THE COURT: Question.

MR. WALKER: I move, your Honor, for the admissibility of those documents in evidence.

THE COURT: Any objections?

MR. BRUGUERAS: No objections, your Honor.

THE COURT: Both will be admitted in evidence as exhibits 88 and 90.

Q (By Mr. Walker) Mr. Rios, you began testifying in this Court to the members of the jury about your job experience, and you testified you were an executive officer from 1972 to 1977.

A Correct.

Q Can you tell us what was your functions and duties in that position, sir?

A It was a position at the appropriate unit. I drew up all kinds of payrolls for the employees of the corporation, both regular and special payrolls.

I processed the certification of all employees of the corporation to other government agencies.

I gave guidance to all employees on the fringe benefits given by the Farm Credit Association. And I substituted for the administrative official during his absenses or his regular vacations.

* * * *

[510] A That is right.

Q Was there a notice of job vacancy published for your position, sir?

MR. BRUGUERAS: Objection, your Honor. We feel that the question is irrelevant, since the position of the witness is not being tried in this case.

THE COURT: I just don't know. Seems to me, it seems to me we have a situation here whereby the committee found irregularities in 31 of 37 managerial positions. And it seems to me that that is really an abnormally large sample to find irregularities.

Therefore, I would, in my own mind, see the relevance of the question posed by Mr. Walker.

MR. BRUGUERAS: I would like to know if there is an evaluation for the position that Mr. Rios occupies?

THE COURT: Well, you can always ask that in redirect. Not now. He is cross-examining now and I am going to allow him to cross-examine.

Q (By Mr. Walker) I repeat my question, sir. Was there a notice of job vacancy published in regard to the position that you were appointed to?

THE COURT: If you know.

Q (By Mr. Walker) If you know.

A No, sir.

Q Were there are other candidates, sir, considered for [511] that position, as you.

THE COURT: If you know, also.

Q (By Mr. Walker) If you know.

A I don't know.

Q Did you form part of a Registry of Elgibles at the time, sir, if you know?

A No, sir.

Q Were you submitted to any type of written or oral exam for that position, sir?

A An oral one with Mr. Eliecer Aldarondo.

THE COURT: What grade, did you obtain in the exam, if you know?

THE WITNESS: As the president, as far as the grade goes, the observation he made was that after the interview and the documents he demanded of me in my position as, in my interim position, and as I was going to be a part of the corporation's negotiating committee, he appointed me to the position of personnel official.

THE COURT: In other words, officially he did not give you any grade in the examination.

THE WITNESS: No, he did it verbally.

THE COURT: Question.

Q (By Mr. Walker) And under that procedure, sir, for those reasons, you were appointed personnel director of the corporation to a career status position?

[512] A The reasons, as I went through the procedure, are the following:

He took my academic training into consideration; my performance during 15 months as acting personnel head of the corporation and the fact that at the moment of my appointment the position, and that he appointed me immediately in addition to the position of personnel official. Member of the negotiating committee of the second collective labor contract of the corporation on management side.

Q Were you submitted to a probationary period, sir, for that position?

A Yes, sir.

Q And you approved it.

A Yes, sir, six months.

Q Tell us now, sir, now that you hold the position, what are your duties as personnel director of the corporation?

A As a personnel official, I have, among my duties and responsibilities, firstly, coordinating, planning, supervising and managing the entire program of personnel management of the corporation.

Q Let me be more specific, sir, if you allow me.

Is it true, or not, that it is your duty, as personnel director, to make sure that notice of job vacancies are published?

A As long as I am so instructed by the president of the [513] corporation, who is the appointing authority.

Q And who is responsible for keeping a Registry of Eligibles?

A Your servant.

Q And you are also responsible to maintain a classification, a retribution plan, correct?

A That is correct.

Q And to give the exams.

A And to give the exams as they should be.

Q Now, sir, in this position as personnel director, is it not a fact that you must be at least familiar with the personnel law of Puerto Rico?

A Yes, sir.

Q And everything related to the personnel system of Puerto Rico for public service?

A Yes, yes, sir.

Q And that includes any resolution that may be issued by the appeals board of the personnel system of Puerto Rico commonly known as JASAP.

A No, sir.

Q You are not supposed to be, at least, knowledgable about those resolutions, sir?

A Well, let's say in a general way, yes, to have knowledge, but—

* * * *

[515] Q Now, sir, in the particular case of plaintiffs Jose Vallines, Margarita Rivera and Evelyn Miranda, isn't it a fact that they had a history of employment within the Government of Puerto Rico for many years before they worked for the Farm Credit Corporation? And throughout that history they had held career, regular positions in public service?

A Some documents in their files reflect that.

Q It is a fact, sir, that according to your own personnel files, these three employees have a history of previous employment in the Government of Puerto Rico? Including career positions?

A This is indicated or reflected in documents which inspire doubt in me as a director of personnel.

Q But, sir, let's take a look at your report, again. In the case of Mrs. Margarita Feliciano—See if you find that. Let me know.

When you make a report as to the prior position she had held in the Government of Puerto Rico, you only go back to 1977. Is that what your report says, sir?

[516] A That is correct.

Q Do you remember when you performed that exhaustive evaluation of her personnel file? Isn's it a fact that there are documents that show that she had been working in the Government of Puerto Rico at least since 1970? Do you remember that, sir?

A That is right.

Q And in the case of Mr. Vallines, your report only mentions the last three positions that he held going back to 1977; is that correct, sir?

A Yes, sir.

Q In fact, sir, from his personnel file, you were able to gather information that Mr. Vallines has served the Government of Puerto Rico since 1961; do you remember that, sir?

A Through certain documents which are not completely precise, that seems to be the case.

THE COURT: When a personnel director has a doubt, what is it that you do? Doubt of this nature. What is the proper thing to do?

THE WITNESS: He examines again and again all documents that can throw light on the subject.

THE COURT: And that is what you did here?

THE WITNESS: Yes, sir.

THE COURT: You still have them?

[517] THE WITNESS: The doubt is about the documents in the personnel file. The documents they brought to the corporation are similar positions to the ones that they occupied within the corporation as regards the career position they held.

THE COURT: Question.

Q (By Mr. Walker) Sir, is it a mere coincidence in Mr. Vallines' case that you go back only to 1977, when in his personnel file appears an OP-15 form that precisely establishes that in 1977 he held his last career regular

position in the Government of Puerto Rico, prior to the last position that you report?

A That document is similar to the one which reflects career positions is within the corporation which were illegal positions.

Q Sir, you have testified to the members of the jury here that you have in this file an OP-15 form dated 1977, which reflects that he had a career status in the Government of Puerto Rico.

And are you saying now that even that position was held legally?

A No, sir.

Q Okay, let me ask you this: Did you, at any time, when you performed this exhaustive investigation, have any doubt with respect to Mr. Vallines' appointment up to 1977?

[518] A What I found was the following: That he had held positions immediately prior to the position he held in the corporation, in trust positions, and that there was an OP-15 which reflected that he had occupied a career position, but not the elements of the document in chronological order which make up a career position.

Q Sir, in your report, in Mr. Vallines' case, you recommend that he be dismissed from employment because his prior position was a trust. Therefore, he had no right to reinstatement.

Is that your interpretation of the right of reinstatement of the employees of the Government of Puerto Rico?

A I must explain, if I am allowed, that as personnel official and examiner of the case, our decision in the case of the agronomist, Jose L. Vallines, basically, the members of the committee found the following:

That the appointment, both to executive vice-president of the corporation and then of first vice-president in charge of credit, a career position, both positions and appointments were made in disregard of the staff regulations. And the merit principle.

Q Sir, that is not my question. I will ask you again.

A And, therefore, pursuant to the right of the right of reinstatement, it is merely a way of offering protection, [519] which at the same time becomes a motivational element to the public servant.

So that if he has been holding a career position, legally, and then goes to a trust position, in order for him to continue offering his best efforts and then has been removed from that trust position, has a right to return to his career position within the public service. And I, as the person who evaluated the case, as the appointments were illegal, or in disregard of the corporation's staff regulations, this right is not applicable to him.

Q Sir, that is your interpretation of the law.

A That is correct.

Q Okay.

MR. WALKER: This is Mr. Vallines' file I would like to mark it 91.

Q (By Mr. Walker) I will ask you, sir, to review in that same file if it is true or not there is a resolution, a copy of a resolution by the appeals board of the personnel system of Puerto Rico called JASAP, which establishes, and this is the *Mietti* case, your Honor.

MR. BRUGUERAS: Your Honor, I must object at this time. I have reviewed that file and I know to what resolution we are being referred to. I must say at this time, and I want the record to show that I had not seen that resolution being part of Mr. Vallines' file. I know the [520] resolution we are talking being.

THE COURT: The file has been on your desk.

MR. BRUGUERAS: No, it has not, actually—

THE COURT: Let me take a look at it.

MR. WALKER: I have an extra copy for your Honor.

THE COURT: Let me take a look at this.

There is a claim that something is here that didn't belong, or doesn't belong.

MR. WALKER: Your Honor, if I remember correctly, from my notes it should be, you open the file, in the second section to your left, it should be there.

THE COURT: Okay. I found it. What is the claim, Mr. Brugueras?

MR. BRUGUERAS: Your Honor, I had copies, a copy of this resolution. In fact I had to send for one with one of our paralegals in my office; we did not have a copy when it was first referred to during the trial, during the beginning of this case.

I recall having studied the personnel files. I honestly don't recall having seen that resolution being part of the file. That is the reason why I had to send someone to get it.

THE COURT: Well, it is here. It is here. Take a look at it.

MR. BRUGUERAS: No, I know the resolution. Like I [521] said, I had to send to, for a copy of the resolution.

THE COURT: Take look at the color of the photocopy. Doesn't look like a photocopy made yesterday. That is for sure. Take a look. I can tell when a photocopy is fresh, you can tell, immediately, by looking at it. You agree that it looks like it had been there?

MR. BRUGUERAS: It looks old, I agree with that.

THE COURT: Go ahead.

MR. WALKER: Can the witness be shown that resolution.

THE COURT: Identification 91, is that right.

THE CLERK: Yes, sir.

MR. WALKER: For the Court's benefit I have an extra copy.

THE COURT: I know. I know what you are talking about.

Q (By Mr. Walker) Sir, isn't it a fact—Please examine page two of that resolution.

THE COURT: This is Mr. Vallines' personnel file.

Q (By Mr. Walker) The second full paragraph of that resolution states that the right of restitution guaranteed by law—

MR. BRUGUERAS: Your Honor, I must object to the reference to the resolution under the terms that these resolutions are not binding to the Agricultural Credit [522] Corporation. Not even if the resolution had been revised by the supreme court of Puerto Rico would it have been binding. It might serve as a guide, in any chance, but we must object that the resolution be used here as a guideline of law, which it isn't, in the first place. If that is the object being referred to.

THE COURT: It seems to me that the reason why the witness is being confronted with this is because that resolution was in the file and any person who carried an exhaustive review of the file must have read the same.

MR. BRUGUERAS: I would first say that the resolution be identified to determine who the parties were.

THE COURT: It is there.

MR. WALKER: It is there. And we have an extra copy, if you like.

THE COURT: That is all right. Go ahead. Objection overruled. Refer to it as the *Milleti* resolution contained in Mr. Vallines' file.

Q (By Mr. Walker) Isn't it a fact, sir, that according to that resolution, the paragraph you were about to read, the right of restitution granted by the personnel law of Puerto Rico constitutes an absolute mandate that is not subject to the discretion or restriction of any nominating authority?

MR. BRUGUERAS: Objection, your Honor. I propose that the document speaks for itself and same terms as my [523] objection before was overruled I suggest that—

THE COURT: Overruled, overruled. The members of the jury will know that the only purpose I am allowing this is because of a resolution by an administrative re-

view board of personnel, from the central office, central government.

The only reason I am allowing it is because that resolution is in the file. And I assume that somebody who reviewed the file must have looked at that.

Now, what is the applicable law? I will tell you what the applicable law is when I give you my instructions on precisely that. At the close of the case I will tell you what is the applicable law.

So for the time being keep your mind open as to that, because the resolution may be the law. It may not. I will give you what I think is the law.

Q (By Mr. Walker) Sir, you had an attorney, as a member of that committee; is that correct, sir?

A Yes, sir.

Q Did you, in any instance, in reviewing these files and rendering these reports, consider the right of restitution of these employees?

A Yes, sir.

Q Did you or did you not?

A Yes.

Q You did.

[524] A Because our staff regulations contain a similar provision to the one that is being shown.

Q That was my next question; that we agreed that your regulation has similar provisions.

A Yes, yes, sir.

Q Okay. But, yet, you concluded, in these three cases, that they had no right of restitution. That is what the report says.

A That is correct.

Q Okay.

Let's take one of these reports one by one, sir. Let's begin with the report of Mrs. Margarita Feliciano. Do you have it with you, sir?

A Yes, sir.

Q In part B(1), where you describe the first position she held in the Farm Credit Corporation.

THE COURT: At this time, we are, we have to take a recess. I must take a telephone call to the states before 4:00. So let's take a 15 minute recess at this time.

—RECESS—

Q (By Mr. Walker) Mr. Rios, we had just stopped at the report rendered by the committee on the case of Mrs. Margarita Feliciano.

* * * *

[547] A No, sir.

Q Then I am at a loss, and I am sorry. I will allow you to explain that to me.

THE COURT: Who made the determination of illegality that was the basis for the personal action taken?

THE WITNESS: The committee.

Q (By Mr. Walker) And based on that determination, that, when you made your recommendations to Mr. De Jesus—

A That is correct.

Q Did you discuss it with him?

A We made the report and gave it to him.

Q Did you discuss it with him, sir?

A We, the committee, by means of attorney Carmen Ruiz, and of your servant, made a brief summary of the contents of the report. And, more or less, we told him the following:

"Pursuant to the assignment you gave us, we evaluated the 37 active positions in the corporation and within the framework of the reports of the Puerto Rican comptroller, and the auditing office of the agriculture department, the committee defined in said documents and with the examination of the documents in the file of each of them, found a series of defects in the personnel transactions of the corporation. And we are delivering the same to you."

Q Mr. De Jesus did the final decision with respect to the action to be taken.

* * * *

[555] Q And it establishes further that if it is for needs of service there is no need for a probationary period to be accomplished.

A That is correct, sir, yes.

Q Isn't it a fact, also, sir, that your regulation establishes that once the employee approves a probationary period he becomes a career regular employee?

A Yes, sir.

Q Then let us please examine the report that was rendered with respect to Mr. Modesto Melendez Manguel. Can you find it, sir?

A Yes, sir.

Q With Mr. Manguel, we have a situation kind of similar that we had with Mrs. Margarita Feliciano, in the sense that he held three different positions within the Farm Credit Corporation; is that correct, sir?

A Yes, sir. The agronomist, Modesto Malendez worked in three positions at the Farm Credit Corporation.

Q And in this particular report you questioned all three of the appointments.

A That is right.

Q Well, let us examine each separate.

With respect to the first position he held at the Farm Credit Corporation, you hear him testify as to how he was [556] appointed, how he was evaluated and the fact that he approved probationary period; is that correct, sir?

A Yes, sir.

Q But in your findings you make a definite finding that he had not approved the probationary period.

I ask you, sir, was that the result of the exhausted examination of Mr. Modesto Manguel's file?

A Using at the report with respect to the first job he held, it says that there was no vacancy announcement, minimum of three months of probationary period.

Q Do you remember ever seeing the evaluation report of his probationary period in his personnel file, sir?

THE COURT: Identification?

MR. WALKER: 92.

THE COURT: Identification 92.

THE WITNESS: With respect to his first position, I did.

Q (By Mr. Walker) That is all we are talking about, at this moment. You agree with me that in his personnel file, which is identification number 92, there are three evaluations for the first position he held at the Farm Credit Corporation.

A That is correct.

* * * *

[564] Q Isn't it a fact, sir, that he held the same position with two different names?

A That is correct.

Q And that the change in name occurred in 1984.

A That is correct.

Q But his duties and functions remained the same.

A That is correct.

Q Now, as part of your findings, sir, again, we have the situation with respect to the probationary period, that apparently, he had not complied with.

A For the position of assistant vice-president he had not undergone probationary period.

Q Sir, but we have already agreed, that is, we are talking about the same position with a different name. Correct?

A Yes, sir.

Q For the position that he was appointed to, originally, isn't it a fact that the evaluations of his probationary period appear in his personnel file?

A With respect to his first position, they do.

Q Sir, do you insist we are talking about two positions or just one?

THE COURT: With different names.

THE WITNESS: With different names.

* * * *

[569] Q So it would be fair for me to conclude, sir, that according to this report, that Mr. Carlos Ortiz never held, within the corporation, a career regular position?

A No, that is not correct.

Q But the fact is, sir, that he became first vice-president in charge of operations and administration. In a similar fashion as Mr. Vallines held the position of first vice-president in charge of credit.

A That is correct.

Q In fact, sir, Mr. Rios position, I am sorry, Mr. Ortiz's position, and Mr. Vallines, within the Farm Credit Corporation, are at the same level.

A That is correct.

Q And according to your report, the position that you questioned in the case of Mr. Carlos Ortiz is the same position that is questioned in the case of Mr. Vallines.

A That is correct.

Q And, in fact, sir, your findings in the case of Mr. Carlos Ortiz are similar to the findings you made in the case of Mr. Vallines.

A That is correct.

Q And your recommendation, and when I say you, I mean the [570] committee, the committee's recommendation with respect to Mr. Carlos Ortiz, is that he be relocated; is that correct, sir?

A That is correct.

Q In the case of Mr. Vallines, your recommendation is that he be dismissed.

A That is correct.

Q And the reality is, sir, that Mr. Carlos Ortiz is still, today, the first vice-president in charge of administration and operations.

A That is correct.

Q Sir, let us review the report you rendered in the case of Mrs. Maria Castro Deyens, your wife.

In her case, sir, the committee recommended that she also be relocated; is that correct, sir?

A That is correct.

Q And if I remember correctly, in your testimony, sir, your wife substituted Mr. Modesto Melendez Manguel in the position he had.

A That is correct.

Q Please review the case of Ms. Maria Diaz De Valle. And I ask you, first of all, to tell the members of the jury who she is.

A Mrs. Maria Diaz De Valle works at the corporation as a lawyer.

* * * *

[574] Q Is he still employed at the corporation today, sir?

A Yes, sir.

Q See if you are also missing the report with respect to Ms. Madaline Colon Davila.

A Yes, it is missing.

Q Her name has been heard by the jury before sir. I ask if it is not a fact that she is the daughter-in-law of Ms. Carmen Sonja Zayas.

A Yes, sir.

Q And she is number 18 in your list.

A That is correct.

Q How about a report from Mr. De Jesus, was it made?

A When the report was—When the board was instructed to carry out the study, as he was already holding a trust position, he was not considered.

THE COURT: But the fact is that those documents that you have in front of you state that he also had problems in his prior appointments. Am I right?

THE WITNESS: Yes, that is true, in a career position, that is correct?

* * * *

[584] THE COURT: Had you heard about that, about what it contains, before?

THE WITNESS: Yes.

MR. BRUGUERAS: Your Honor, if I may, is the document marked as an exhibit or I.D.?

THE COURT: Exhibit. Would you please read that document to the jury.

THE WITNESS: It is exhibit 1.

THE COURT: Would that include the Farm Credit Corporation?

THE WITNESS: Yes, sir.

THE COURT: That is May 1st—Am I right, 85?

THE WITNESS: That is correct.

THE COURT: Would you please translate that.

THE WITNESS: "Special normative letter number 1-85. To government secretaries, agency heads, directors of public corporations and mayors, personnel system and agencies excluded from the law of personnel of public service of Puerto Rico. From attorney Guillermo Mojica Maldenodo, director.

RE: Right to administrative hearings in case of removal and in case of suspension from the employment and salary.

[585] Introduction: The law of public service Puerto Rico, number five of October 14, 1979, as amended, provides in its Section 4.6, Section 4, that the appointing authorities may remove any career employee for just cause after charges have been filed in writing.

This is the text of said provision as it was amended through law number one of July 17, 1979.

Before said amendment, it provided that the appointing authorities could remove any career employee for just cause after the filing of written charges and after an administrative hearing, if the employee so desired.

In accordance with said provision, Section 9.2 of the personnel regulations, essential areas for the merit principle which established the procedure which must be followed in every case in which the possibility of application

of disciplinary measures arose, whose punishment could result in the removal of an employee or in the suspension from employment and salary, included specific provisions on the right of the employees in such situations to request an administrative hearing.

In accordance with the statutory amendments noted above, in 1980, this provision of the regulations was also amended to eliminate the part regarding the informal administrative hearing.

The provision is in effect of the law personnel of [586] public service and the staff regulations. Essential area for the merit principle noted above are now unconstitutional.

The federal Supreme Court, in opinion of March 19, 1985, in the case *Steven Board of Education v. James Loudermill, et al.*, (83-1362, 83-6392), decides that once the state creates an interest or proprietary right as is the right to employment, due process of law to be applied in order to protect this proprietary interest is a matter of which is, pertains exclusively to the federal constitution.

In other words, that the state continues to have the last word in the creation of proprietary interest. But once it creates it, the last word so what procedures are necessary in order to protect them belongs to the Supreme Court of the United States, according to the Fourteenth Amendment.

It decides, in addition a public career employee has a right to an informal hearing before his dismissal is carried out.

Essentially, according to the Fourteenth Amendment, the institutionality procedure required in order to dismiss public employees of the state is the following:

A: Before being dismissed, he must be notified of the charges filed against him and of the intention to dismiss him and he must be given an opportunity to an informal hearing so that he can refute or explain the charges which[587] have been raised against him.

B: After the informal hearing the decision must then be taken to dismiss subject to the later holding of a formal hearing with all the requirements of due process of law.

The Supreme Court also decides that in situations which it is perceived that keeping an employee in the position constitutes a significant risk, he can be suspended from employment before the administrative hearing.

That is to say, that the norm, in these cases, is suspension from employment but not suspension from employment and salary as is provided in Section 9.2 of the staff regulations, essential areas for the merit principle.

Therefore, this provision of the regulations is also unconstitutional.

In the case mentioned, the Federal Supreme Court says, also, that the need to offer the employee the opportunity of an administrative hearing before the final decision of dismissal is evident, considering the just balance of the interest involved: The interest of the employee in keeping his position and the interest of the government that the dismissal of employees' good conduct deserves such action, be it is carried out expeditiously and at the risk of incorrect decision be avoided.

It expresses, likewise, that the administrative [588] hearing must constitute a mechanism which avoids erroneous decisions and must permit the determination, whether a reasonable basis exists to conclude that the facts which are imputed to the employee are true and that the charges filed against him are maintained and the action which is proposed against him.

This letter has a purpose of establishing wrongs with respect to the rights of the career employees to request administrative hearings before the action of the appointing authorities with regard to their dismissal or suspension from employment and salary.

Thus, fulfilling the requirements of due process of law according to the safeguards of the Constitution of the United States.

Heading. Norms:

One: The appointing authorities may remove or suspend from employment in salary, any career employee for just cause after the filing of written charges and after an administrative hearing if the employee so requests.

Two: In every case in which the possibility of application of disciplinary measures arises, whose punishment could result in the suspension of the employment in salary or in the removal of a employer, the appointing authority shall adopt the following procedure:

The appointing authority shall carry out an [589] investigation within the 10 working days after it took official notice of the facts and shall make a decision. Whether the taking of any disciplinary measures was in order.

Should such disciplinary measures be in order, it will file written charges against the employee and will notify him, warning him of his right to an administrative, informal administrative hearing within the term of 15 working days as of the date of receipt of the notification of the charges.

At the hearing, the employee in question will have the right to produce the evidence he may consider necessary.

After the hearing, or after the term of 15 days has elapsed, without the employee having requested it, the appointing authority should take the decision which it may consider open to him.

If the decision is to remove the employee or suspend him from employment in salary, he will warn the employee of his rights to appeal before an Appeals Court of the personnel administration system within a period of 30 days, as of receipt of the notification.

In those cases regarding misuse of public funds or when there are reasonable grounds for believing that

real danger exists for the health, life or morals of the employees or population in general, the employee may be suspended from employment before the administrative hearing.

[590] Heading. Applicability. These norms are applicable to the occasions covered by the personnel system created by the personnel law of public service of Puerto Rico.

The agencies encompassed in the administrative, in the sample administration and the individual administrators. Nevertheless, as these rules include one of the essential areas for the merit principle, namely, the question of retension, the agency excluded from the provisions of said law which have the duty, according to Section 1016 of same, of adopting a personnel regulation incorporating the merit principle will govern the personnel rules of those employees which are not covered by collective bargaining agreements, must adopt similar rules.

Heading: Openings. These norms enter into effect immediately.

THE COURT: Mr. Rios, let me ask you something.

Isn't it a fact, that by March 17, when—Let me take a look at that exhibit again.

Strike that question.

Let me ask you this: Did you, did your corporation grant the plaintiffs in this case purportedly career employees, all of them, according to the files, the hearing that was mandated by the Supreme Court case, since at least 19th of March, 1985?

[591] MR. BRUGUERAS: Your Honor, I must object to the question, very respectfully.

THE COURT: You are entitled to that.

MR. BRUGUERAS: I propose to the Court that it has not been established that these plaintiffs were due the process that establishes the *Loudermill* case.

THE COURT: Why not? You are saying, that is your objection.

MR. BRUGUERAS: I make my opinion principally in the *Kaufman* case. Any way, it would be a matter, if the hearing was or was not granted, it would be a matter of law. Which I don't think the witness is qualified—

THE COURT: The question is, let me ask you this: Before these people were dismissed, were they granted a hearing so they could present their side of the story? Let me put it this way.

THE WITNESS: No, sir.

THE COURT: Okay. Any additional cross-examination?

MR. WALKER: I have three more areas.

THE COURT: Okay, we are going to do that, then, after lunch.

I am going to excuse the jury now until after lunch, and I don't think I have to repeat what I have told you before. I will see you at—let's make it 2:00 o'clock.

* * * *

[601] Q In fact, his name appears twice in that report at the top and at the bottom.

A Yes, that is correct.

Q Another name that appears in that report is that of Mr. Guillermo Cancel Pagan.

A That is correct, yes.

Q And that of Ms. Madaline Colon Davila.

A Yes, it appears in the report.

Q And that of Mr. Carlos Ortiz. On the second page.

A That is correct, yes.

Q And it is also correct, sir, that of the plaintiffs in this case, none of them are mentioned in that report except for Ms. Zenaida Valentin?

A As this is an auditing report based on a sample, Ms. Zenaida Valentin Bonet appears.

Q None of the other plaintiffs are mentioned in this report, sir; is that correct?

A On the margin of the report, on the second page under "observations," the following text appears: "Mr. Marrero Padilla resigned his position on December 21, 1981. Mr. Jose Vallines was appointed to the position on January 9, 1982 with a salary of $2,335.

* * * *

[608] Q And then there is a list of employees that are are considered, right, sir?

A And then the annex reflects location and title of the position and the fiscal year.

Q And out of the names that are mentioned in that annex, sir, the name of Mr. Francisco De Jesus appears twice, again; is that correct, sir? In the first page.

A That is already in the Puerto Rico comptroller's report, reflects Mr. Francisco De Jesus in the report.

Q How many times in the annex, sir?

A It appears for fiscal year 1979, '80, and for fiscal year 1981, '82.

Q And in page two, if it is true or not that the name of Mr. Carlos Ortiz appears twice, page two. Is that correct, sir?

A That is correct, yes.

Q And the only plaintiffs, sir, that are mentioned in this annex, are Ms. Zenaida Valentin, once, and Ms. Evelyn Miranda, once.

A That is correct. Ms. Zenaida Valentin and Evelyn A. Miranda appeared.

Q None of the other plaintiffs appeared in that annex.

A As it is an annex based on a sample, only the two appear.

* * * *

[615] THE WITNESS: It says that no information must be released related to personnel data, management plans or any other type which does not have the previous and direct approval of the president, executive vice-president or head of the office of Legal Affairs and Industrial Relations.

THE COURT: Question.

Q (By Mr. Walker) Isn't it a fact, sir, that as an employee, you have the duty not to divulge confidential information, and that is in the law?

A According to the law, yes, but not according to the memorandum.

Q I respect your opinion, sir.

Now, sir, let me ask you this.

You have mentioned on various occasions the need for the union, or the union members to participate in this selection process of the corporation.

A Yes. I have expressed that the sum total of the personnel which is working or cooperating at the corporation owing to the years of service, their training and their experience, have a desire of self fulfillment as professionals and technicians within the corporation, and I, myself, am an example of it.

Q Let me ask you this, sir: Isn't it a fact that the union never filed any grievance or complaint with respect to the positions that were held by any of the plaintiffs in this [616] case?

A That is correct.

Q And isn't it also a fact, sir,—

MR. WALKER: I will rephrase the question, your Honor.

Q (By Mr. Walker) You testified to the members of the Court, you gave the names of those persons that substituted plaintiffs after their dismissal.

A That is correct.

Q In the case of Mr. Vallines, he was substituted by Mr. Ortiz Espanosa.

A That is correct.

Q Isn't it a fact, sir, that he did not come from the union, much less, was he an employee of the Farm Credit Corporation prior to substituting Mr. Vallines?

A He worked for 12 years at the Farm Credit Corporation. He started in a position as farm credit spe-

cialist. And he reached the position of regional director in Caguas and also in San Juan.

Q Sir, but when he was selected to come substitute Mr. Vallines he comes from the outside. Is that correct?

A That is correct. He comes from the Bank of America. Where he had worked for six years in investments and evaluations.

Q Sir, in the case of Mr. Madesto Melendez Manguel, he was [617] substituted by your wife, Mrs. Maria Castro. When she was appointed to that position she had not come from the union; is that correct, sir?

A She started at the corporation as a loan analyst in 1973, which is a unionized position, and after 13 years of service she reached management position.

Q She was not a union member in her prior position immediately before substituting Mr. Modesto Melendez Manguel, is that a fact, sir?

A That is correct.

Q Mrs. Maria Gonzalez Cloudia substituted Evelyn Miranda. Did she come from the outside or was she an employee at the corporation?

A She was an employee of the corporation for many years then she went to AFDA. And then after the vacancy announcement she returned to the corporation.

Q She was not a member of the union and she was not in the corporation when she substituted Ms. Evelyn Miranda; is that correct, sir?

A When she substituted Ms. Evelyn Miranda, she said she, as I said before, she was coming from AFDA.

Q And in the case of Mr. Orlando Ortiz Roura, he was substituted by Ms. Vacetas Antonio. Had she ever previously worked for the corporation, sir?

A No, she worked for 13 years in the public instruction [618] department.

Q And Ms. Mirium Vacenti substituted Mrs. Margarita Feliciano. Had she been an employee of the corporation previously, sir?

A Ms. Myrian Vincente was the person that substituted Ms. Margarita Rivera, who was subject to exam and both had to do an exam.

Q That is not my question, sir. All I am asking is, where did she come from when she substituted Mrs. Margarita Feliciano?

A Ms. Myriam Vincete came from private enterprise.

MR. WALKER: I have no further questions, your Honor. Thank you very much.

THE COURT: Thank you very much. Would counsel please approach the bench.

* * * BENCH CONFERENCE OFF THE RECORD * * *

THE COURT: Members of the jury, let's take a brief recess before we receive the redirect examination of Mr. Rios. Let's think in terms ever 15 minutes or so. If you want to go downstairs, of course, you can.

* * * RECESS * * *

THE COURT: Mr. Brugueras, you say redirect about 10, 12, 15 questions at the most and then your next witness will be Mr. De Jesus. And that is going to take how long, more or less? I am just asking, so I can plan accordingly.

* * * *

[646] There were 36 people, excuse me, 37 people, and I took action first with regard to those appointments which were null from the beginning.

But the other ones were people who had spent their entire careers at the Farm Credit Corporation. And if I take an action against all of them, the corporation would have lost practically its entire management personnel.

THE COURT: What you are telling me is, or you are telling us is that those 30, or 31, potentially, could have been dismissed?

THE WITNESS: No, no. I can explain the situation.

THE COURT: Why do you say you would have been without personnel?

THE WITNESS: Because there were others like there are here. I will give you an example.

Maria Diaz De Valle. a very good lawyer, I would have had to dismiss her, too. But I didn't, I retained her and she is still at the corporation.

THE COURT: Her appointment was illegal, too?

THE WITNESS: Her appointment was illegal, yes.

THE COURT: She is still there.

THE WITNESS: She is there for the following reasons. But her position there was for $980, a lawyer who is earning $980. She wasn't substituting anybody and we needed lawyers there.

* * * *

[679] Q (By Mr. Walker) Sir, as I heard you testimony, yesterday and today, I gathered the impression that with respect to the report rendered to you by the committee, the final decision as to what was to be done in each particular case was your decision: is that correct?

A I had to take the decision in accordance with the recommendations and based on the recommendations which the committee made to me.

Q But it is a fact that not in all the cases you followed the recommendation made; is that correct?

A Not all the recommendations were followed because of what I explained before.

Q Specifically, sir, in the case of attorney Maria De Valle, you testified that although she holds a position that is illegally, according to the report, you never dismissed her and she is still working there; is that correct as of today, sir?

A And I said I was going to take action this year. Not right now.

Q What are the reasons, sir, that you have, I think, twice expressed to the members of the jury, for not dismissing this employee, is that her salary was kind of

low, and if my notes are correct, you said that she was earning $980.

A What I spoke about was basic. Now she earns more.

* * * *

[701] Q I will be more specifically.

A With great pleasure.

Q Isn't it a fact that in case ever Mr. Manguel Antonio Gusto?

A Yes

Q Before you took a final determination as to what you were going to do with him, you notified him previously?

MR. BRUGUERAS: Objection, your Honor.

THE COURT: Grounds?

MR. BRUGUERAS: Here are the facts as to the circumstances surrounding the personnel action taken against Mr. Manuel Antonio Gusto has not established in this case.

THE COURT: The only question is whether he afforded him some kind of hearing before the personnel action was taken.

MR. BRUGUERAS: With all due respect, we think they are very important, inasmuch as they influence the witness in the decision he eventually took.

THE COURT: Objection overruled. This is a legitimate question. Taking into consideration the status of the law and taking into consideration what the regulation provides. It is a perfect legitimate question.

Q (By Mr. Walker) Isn't it a fact, sir, that in the case of Mr. Gusto you provided him an opportunity to explain?

[702] A Because he was a career employee within the corporation. And his previous appointment was legal.

Q That is not my question, sir.

THE COURT: He answered your question. Indirectly he said that he did give him an opportunity. So go to another subject.

Q (By Mr. Walker) Do you do the same thing with Mr. Luis Valazquez.

A Yes. Inasmuch as he was a career employee within the Farm Credit Corporation.

Q Okay, sir, now that we are talking about career employees and you abide so much by your regulations, let me ask you this:

A Yes.

Q Isn't it a fact that your regulation establishes that once an employee approves a probationary period, he obtains career regular status?

A If he is legally appointed.

Q Please, sir, let's refer again to your regulation. Specifically, page 20.

A 20. Uh-huh.

* * * *

[801] In other words, plaintiffs must prove that political affiliation was a motivating factor in the decision to separate them from the positions they occupied.

Said in another way, isolated evidence that one party or the other was of a given political party should not be enough. You must look at all the evidence, direct and circumstantial, to determine if political affiliation was the motivating factor.

If the claim of unconstitutional action by Mr. De Jesus, as president of the Farm Credit Corporation, is to bind the Farm Credit Corporation, there must be proof that the acts of Mr. De Jesus were done pursuant to the policy of which, the policy of the agencies of which he was the chief executive. That is, that the alleged unconstitutional conduct was more than an isolated act on the part of the president of the corporation.

In other words, you must find that the alleged conduct was that of the president and the corporation he heads.

In deciding this issue, consider the position and executive power of the president of the corporation, his role

[802] within the corporation itself, in the context of this case and whether he acted in his official capacity.

I will now tell you something about damages, and by telling you about this, I am not implying that you have to reach that issue. If you reach it, fine. If you don't, fine with me, also.

For each claim of which defendants are liable, plaintiffs are entitled to recover an amount which will reasonably compensate them for the losses and damages they have suffered as a result of any found unlawful conduct.

Conduct by defendants that doesn't cause harm, does not entitle plaintiff to damages.

By the same token, harm to plaintiffs, which is not the result of unlawful conduct by the defendant, does not entitle plaintiff to damages.

You may not award damages based on speculation or guesswork. Any award must fairly compensate plaintiff under injury but must have a basis in the evidence and must be reasonable in light of that evidence.

An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage. And that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.

* * * *

[828] THE COURT: So if we strike what you are proposing, what is the net result of this?

MR. BRUGUERAS: Well, the verdict would remain as to the due process part and the amounts will probably, won't vary. I don't know. I actually, this is the first time I have been confronted with the situation, to be honest. And in that sense we would have another motion to present to you.

THE COURT: Well—

MR. BRUGUERAS: I don't know if it should be submitted again to the jury.

THE COURT: Submitted again to the jury?

MR. BRUGUERAS: No, no, I withdraw my—

THE COURT: Are you claiming that the verdict is inconsistent? Because if you are claiming it is inconsistent, then we cannot accept the verdict.

MR. BRUGUERAS: I am not saying that. I am saying that the verdict, if it, on one issue, states that the corporation violated their constitutional rights because they discriminated agaist them, they would have to pinpoint to someone. Maybe it was Mr. Rios, maybe it was somebody else, but those persons have to—

* * * *

APPENDIX G

BRIEF FOR APPELLEES EXCERPTS

* * * *

A. KAUFFMAN RULING NOT APPLICABLE

FCC's reliance in Kauffman vs Puerto Rico Telephone Company, 841 F.2d 1169 (1st Cir. 1988) ("Kauffman") is misplaced. *Kauffman* is inapposite for various reasons. First of all, it was decided on a Rule 56 motion (summary judgment). The facts were never "aired out", like here. Second, the District Court had concluded that plaintiffs had failed to generate a genuine issue of material fact regarding the claim that their discharge was politically motivated, and this Court so agreed. *Kauffman*, page 8. In our case the jury verdict makes precisely a contrary finding that the dismissals were politically motivated. Third, this Court found that plaintiffs' political discrimination claims were based upon "mere conclusory statements" and were unsupported allegations, *Kauffman*, pg. 9. In our case, to the contrary, there is abundant and overwhelming evidence which established that plaintiffs' would not have been fired "but for" their political affiliations. Plaintiffs heerin generated the specific facts necessary to establish their claim and proved them beyond the realm of speculations. *Kauffman*, page 10, nt. 5. The record reveals the disparate treatment: plaintiffs were substituted by persons affiliated to the PDP; other FCC employees hired in similar fashion were not dismissed because they belonged to the PDP, and the political endorsements requested from plaintiffs in order to retain their jobs—testimony and documentary evidence is in record. Contrary to *Kauffman*, the record here provides specific information as to names of individuals and their positions in support of the political discrimination claim, *Kauffman*, page 10.

With respect to the due process issue in Kauffman, page 11, contrary to the District Court finding in said case, the jury here found that plaintiffs were career employees. In so finding it clearly rejected FCC's contentions—and supporting evidence—that plaintiffs had no career status. As already discussed, the jury in its findings clearly rejected this argument. This Court held in *Kauffman* at 12:

> "We believe that the District Court correctly concluded that under Puerto Rico law any property right associated with a career position is rendered null and void if a violation of the personnel act attends the filling of such a position. *While the law is not absolutely clear in this regard, we are reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in a state who is familiar with that state's law and practices.*" (emphasis supplied)

The District Judge in our case, Judge Fuste, applied the law as established by the Puerto Rico Supreme Court to the facts of this case and consistently rejected FCC's argument based on Kauffman (Tr. 409, Add. 2).

Also, contrary to plaintiffs in *Kauffman*, plaintiffs herein never conceded that their appointments violated any regulation. The jury heard and saw abundant evidence as to the manner and process of recruitment, all in compliance with applicable regulations. The jury so found. We proved the appointments were made in accordance with FCC regulations. Thus, plaintiffs' property interest here is protected by the circumstances in employment *and* by law. *Dept. of Natural Resources v. Correa*, supra at 2.

Contrary to *Kauffman* also is the fact that there was a regulation which gave preference to internal employees. No such provision exists here. In our case, the record

reveals that plaintiffs were substituted in some instances by persons who came from outside of FCC (Tr. 615-618, Add. 2). The record also reveals that no FCC employees ever complained about plaintiffs' appointments. It is totally misguiding to this Court FCC's claim that "other employees or persons were denied the opportunity to compete".

All the above shows that our case is substantially different from *Kauffman*, both in the facts and the applicable law. FCC's desperate reliance in Kauffman is in vain.

By the same token, the jury instruction complained about by FCC, alleging failure to follow *Kauffman*, is harmless. For the previously stated reasons, *Kauffman* is not the applicable law and, furthermore, the instruction is about an issue that is immaterial in light of the jury verdict, mainly because of the political discrimination finding. *Elwood vs Pina*, 815 F.2d 173, (1st Cir. 1987); Wright and Miller, *Federal Practice* and Procedure, Vol. 11, § 2886, pg. 291. Therefore, even if this Court were to find that the instruction was error, which plaintiffs refute, the error is still harmless. An important factor in determining whether an error was harmless is the strength of the case in support of the verdict. Ibid. at 278. The verdict in our case is fully supported by the evidence presented. The claimed error is harmless and immaterial

B. ARBONA DECISION INAPPOSITE

Likewise, FCC's reliance in *Arbona Custodio vs De Jesus*, 678 F. Supp. 40, (DPR 1988) ("*Arbona*") is misplaced. Although *Arbona* was an action filed against Mr. De Jesus, FCC's President, the facts in that case show that it is not identical—contrary to FCC's assertion here—but is, rather, the complete reverse. Let us see.

To begin with, plaintiffs in *Arbona* were not dismissed from employment, but only relocated to their former positions (District Court Finding five). In *Arbona* Mr. De Jesus recognized the right to restitution that is guaranteed by law to career employees. Said right was totally denied to plaintiffs in our case, as the record clearly shows. Second, the plaintiffs in *Arbona* were given their due process rights (Findings 9 and 10). In our case no prior opportunity to be heard was given to any of the plaintiffs, nor after. The dismissal here took place by the receipt of a letter effective *that very same day*. Third, in *Arbona* plaintiffs had a right to appeal (Finding eleven). In our case the record reveals that at the time of dismissal there was no Board of Appeals because the positions were vacant (Tr. 503, Add. 2). Therefore, the right to appeal, as notified by Mr. De Jesus in the dismissal letter, was sheer mockery. Furthermore on this point, the letter of dismissal granted plaintiffs only ten days to file appeal while FCC's own regulations establish a period of thirty days to appeal (Plaintiffs' Exh. 2, Art. IX § 2, page 33). The disparate treatment between plaintiffs in *Arbona* and plaintiffs here is obvious. Fourth, the District Court's finding twelve and thirteen in *Arbona* are contrary to the jury findings here. The *Arbona* decision has no bearing in our case, except where the Court reiterates the doctrine that no discharge may be politically motivated, citing with approval *Guerra v. Servicios Sociales*, 113 DPR 50 (1982); *Accardi vs Schaughnessy*, 37 US 260 (1954); and *Mass Fair Chare vs Law Enforcement Assistants*, 758 F.2d 708 (D.S. Cir. 1985). As is evident, in *Arbona* Mr. De Jesus did precisely what had earlier failed to do with plaintiffs herein. That is why the cases are not identical, as FCC asserts; they are the opposite.

C. PLAINTIFFS' HISTORY IN GOVERNMENT EMPLOYMENT

Plaintiffs take serious issue with respect to the characterization made by FCC in its brief as to the manner plaintiffs' appointments took place. That characterization is not what the record shows. We are compelled, therefore, to address the appointments procedure of each plaintiff separately.

Plaintiff Margarita Rivera Feliciano had been a public employee for fourteen (14) years, working at different government agencies of the Commonwealth of Puerto Rico. She was first employed in 1971 with the General Services Administration where she occupied a career permanent job. Her last employment was held at the FCC. She was employed by FCC in 1981 as an Administrative Secretary II. She was granted job tenure after completion of her probationary term (Plaintiffs' Exh. 3-6). * * *

* * * *

QUESTIONS PRESENTED

Whether a verdict against an agency or municipality can stand when the jury has exonerated the only official who by his conduct allegedly caused plaintiffs' constitutional harm and who had the final authority to establish agency policy with respect to the action ordered.

Whether the Court of Appeals for the First Circuit has misinterpreted local Puerto Rican Law and judicial decisions with respect to the question of whether and under what circumstances a public employee acquires a sufficient property interest in his job to invoke the protection of constitutional due process.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-102

MARGARITA RIVERA DE FELICIANO, ZENAIDA VALENTIN, EVELYN MIRANDA, ORLANDO ORTIZ ROURA, JOSE VALLINES and MODESTO MELENDEZ MANGUAL,

Petitioners,

v.

FARM CREDIT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by Petitioners, seeking review of the First Circuit's judgment in this case.

STATEMENT OF THE CASE

On August 2, 1988, based on the verdict rendered by the jury in this case on July 20, 1988, the District Court for the District of Puerto Rico entered judgment and ordered Farm Credit Corporation, (hereinafter FCC) to reinstate plaintiffs to the positions

they formerly held in FCC, awarded them back-pay and ordered FCC to pay compensatory damages in the amounts determined by the jury.

Respondent FCC is "a body corporate and politic constituting a public corporation and governmental instrumentality", created by the "members of the Council of Secretaries of the Commonwealth of Puerto Rico", P.R. Laws Ann. tit. 5, § 1201 (1981), that is "attached to and [forms] a part of the Department of Agriculture of Puerto Rico." P.R. Laws Ann. tit. 5, § 1203.

Petitioners, Margarita Rivera de Feliciano, Orlando Ortiz Roura, Evelyn Miranda, Zenaida Valentín, Modesto Meléndez and José L. Vallines, are employees of FCC who hold diverse career positions ranging from First Vice-President in Charge of Farm Credit to Administrative Secretary II. On August 16, 1985, they filed suit against FCC, its President, Francisco de Jesús, and the then Secretary of Agriculture, Antonio González Chapel. The two individual defendants were sued in their personal and official capacities.

Plaintiffs claimed that they had been fired from their respective positions because of their ideological beliefs and affiliation to the opposition is New Progressive Party, in violation of their rights protected by the First Amendment to the U.S. Constitution. They also claimed that they had been deprived of property rights, afforded and secured to them under the Personnel Regulations for Managerial Employees of the FCC, without due process of law.

The onus of plaintiffs' complaint, and indeed the whole focus of their evidence, was exclusively directed against defendant Francisco de Jesús. At no point in

this 42 U.S.C. § 1983 action, either in the complaint, the pre-trial order, or during the trial, did plaintiffs allege (and much less prove) that FCC, as a local governing body, could be sued directly under § 1983, because "the action that is alleged to be unconstitutional implements or executes a policy . . ., promulgated by that body's officers . . . (or was taken) pursuant to governmental custom. . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

In due course, and after answering the complaint, on July 13, 1987, FCC moved for dismissal on the basis of the Eleventh Amendment immunity that protects the Commonwealth of Puerto Rico, its departments and instrumentalities. Four days later, the district court denied FCC's motion.[1] After further pretrial proceedings that are not relevant to this Petition, a jury trial was held from July 11 to July 20, 1988. One the fifth (5th) day of trial, defendant Antonio González Chapel's motion for directed verdict was granted by the court below. Subsequently, on July 20, 1988, the jury rendered its verdict and found FCC's President, defendant Francisco de Jesús, not liable. Pursuant to such verdict, the lower court dismissed the complaint against Mr. de Jesús. For these reasons, the only two individual defendants whose conduct could be affirmatively linked to FCC were exonerated of the commission of any of the constitutional torts alleged by plaintiffs. Nevertheless, and in spite of the fact that the conduct of the only two

[1] The Eleventh Amendment issue was raised on appeal by FCC. Since the First Circuit reversed the judgment against FCC on other grounds, however, there was no need to reach that issue. See Petition's Appendix at page 2a.

persons with final authority to determine the policy of FCC was found not to constitute a constitutional violation, the jury verdict against FCC was sustained by the lower court, judgment was entered against FCC, and an injunction was issued on the basis of such verdict ordering the reinstatement of plaintiffs with back-pay. See Petition's Appendix at pages 23a and 29a.

On July 26, 1988, FCC, the only remaining defendant in this case, filed its notice of appeal. The Court of Appeals for the First Circuit reversed. The Court held that the verdict against the FCC in the political discrimination claim could not stand due to the jury's verdict in favor of De Jesús and that Petitioners had failed to show a sufficient "property" interest in their jobs to invoke the protection of the due process clause.

REASONS FOR DENYING THE WRIT

I. The First Circuit's Decision As To Petitioners' First Amendment-Political Discrimination Claim is not in conflict with the decision of this Court or of any of the Federal Circuit Court of Appeals' decisions.

Petitioners' principal argument is that a jury verdict against the FCC can stand, interpreted as a finding of unconstitutional policy on the part of FCC, even in the face of a jury verdict exonerating the only other defendant, De Jesús, President of FCC, who fired plaintiffs and who was the only official in the agency with final authority to establish policy with regard to the hiring and firing of employees. Petitioner's argument is simply wrong. In light of this Court's decisions in *Monell v. New York City Department of Social Services* 436 US 658, 694 (1978);

Los Angeles v. Heller, 475 US 796 (1986); *Pembaur v. Cincinatti*, 475 US 469 (1986) and *City of San Louis v. Praprotnik* 485 U.S. 112 (1988), the decision of the First Circuit precluding a finding of liability against FCC when its principal officer and the person who allegedly acted in an unconstitutional manner was exonerated by the jury, seems to be required.[2] Indeed, apart from very confusing and general allegations of conflict, Petitioners fail to indicate the nature and extent of any conflict between the First Circuit decision and this Court's precedents. Petitioners also fail to point out any specific conflict between the decision of the First Circuit Court of Appeals and any other circuit. Contrary to petitioners' unfounded allegations, a reading of the opinion of the Court of Appeals for the First Circuit clearly demonstrates that it is consistent with Supreme Court doctrine and merely represents a careful and considered application of that doctrine to the very particular set of facts and circumstances of this case.

Two basic principles, established by this Court, interact in this case to preclude the jury's finding of liability against FCC. First, in other to establish liability for a government agency or municipality, the plaintiff must establish that a constitutional deprivation has taken place and that such deprivation is the result of a policy or custom of the agency. See

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[2] Petitioners' assertion that the issue of inconsistent verdicts was "never raised on appeal nor briefed" nor discussed at oral argument is totally misleading. A whole section of Respondents' Brief in the Court of Appeals was devoted to that issue. See Petition's Appendix at pages 17a-18a. The fact that the issue was not extensively discussed at oral argument is, of course, irrelevant.

Monell v. New York City Department of Social Services, 436 US 658, 694 (1978). In *Los Angeles v. Heller*, this court held that if a jury has concluded that the plaintiff has suffered no constitutional deprivation or harm, the agency or municipality may not be held liable because of the existence of an unconstitutional policy which may have authorized the infliction of the unconstitutional harm. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations may have *authorized* the use of constitutionally excessive force is quite beside the point." *Los Angeles v. Heller*, 475 US at 799.

Second, the Court has held that in order for an agency or municipality to be held liable for an isolated or single act of an officer, the decision to take the action involved must have been taken by the official or officials who have the final authority to establish policy with regard to that particular activity. In *Pembaur v. City of Cincinnati*, 475 U.S. at 481, this Court stated that before a municipality or an agency can be held liable it must be established that the "decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." This Court held categorically that municipal or agency "liability under 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.*, 475 U.S. at 483-484.

These two clearly established principles preclude the finding of liability against FCC, because De Jesús, the President of FCC, was both (1) the officer who

acted against the plaintiffs by dismissing them and (2) the officer with final authority to establish agency policy regarding employment practices or to take the decision to follow a specific course of action regarding employment matters. As the Court of Appeals for the First Circuit concluded, see Petition's Appendix, at page 6a.

> [t]o establish an agency's liability the plaintiffs must show that the discriminatory acts were done by persons with 'final authority to establish [the agency's] policy with respect to the action ordered, . . . In this case, the *only* person plaintiff claimed to have such authority was De Jesús. The record contains no evidence that any other FCC officials . . . had final policy making authority. . .Thus the only legally adequate basis for the FCC's liability was eliminated by the jury's verdict in favor of De Jesús.[3]

Petitioners emphasize throughout the Petition that, in this case, the jury made a determination that an unconstitutional policy of political discrimination existed at FCC and that such policy was the cause of

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[3] The Court of Appeals considered that there might be circumstances in political discrimination cases where "jury verdicts of this sort could prove consistent" because there "might well be a basis for an agency's liability other than the conduct of the exonerated defendants", or because a jury's verdict might reflect the belief than an employee "while acting pursuant to the agency's unlawful policy nonetheless acted in good faith" and was entitled to qualified immunity. Petition's Appendix at page 5a. In this case, the issue of De Jesús' qualified immunity was decided by the District Court in plaintiffs favor and was not submitted to the jury. Petition's Appendix at page 6a.

petitioners' alleged deprivation of their constitutional rights. See Petition at pages 6, 7, 8, 9, 10, 11 and 12. (For example at page 7, Petitioners stated "The jury determined that it was FCC policy what caused the constitutional harm"). Petitioners' assertion that the jury made a determination of the existence of an unconstitutional FCC policy, independent of the actions attributed to De Jesús, is simply false.

From the beginning to the end of this case at the trial level, De Jesús' actions and FCC's policy have been inextricably intertwined in petitioners' theory of the case. Neither in their complaint nor in the statement of plaintiffs theory contained in the Pretrial Order, did petitioners allege the existence of a policy of FCC, which execution caused the alleged violations of their First Amendment rights, independently of De Jesús' actions. Similarly, petitioners did not request such an instruction from the District Judge to the jury. The unobjected instructions to, the jury clearly rested FCC's liability on De Jesús liability. As the First Circuit noted "nothing in the instruction even hints that the jury could find the FCC liable without finding De Jesús liable." Petitioners' Appendix at page 8a. Thus, Petitioners' statement that the jury found the existence of an unconstitutional policy at FCC bears no resemblance to reality.

Moreover, the failure of the District Court to send the jury back to reconsider the inconsistent verdict can be attributed to Petitioners' trial strategy. After the jury returned its verdict, petitioners "wishing to preserve their favorable verdict against the FCC, simply argue that the court should accept the verdict", and did not seek the resubmission of the case to the jury. Petitioners' Appendix at page 9a. Further,

petitioners did not appeal the judgment in favor of De Jesús. As the Court of Appeals stated "under these circumstances it seems procedurally fair to decide the case according to the ground rules that counsel have set: if the verdicts are consistent, the plaintiffs win; if they are inconsistent, the FCC wins". Petitioner's Appendix at 9a.

Thus, the inconsistency of the verdict and/or the illegality of the jury finding of liability of FCC at the same time that it exonerated its president De Jesús, is due, not only to the correct application of the appropriate legal principles as discussed above, but also to petitioner's legal strategy at the District Court level. Through the whole course of those proceedings Petitioners emphasized the relationship of De Jesús and FCC liabilities. Only when the jury returned its verdict, the Petitioners, all of the sudden, discovered the existence of an FCC policy independent of the actions and decisions of De Jesús.

In sum, the First Circuit opinion is nothing more than the correct application of the relevant legal principles to a very particular and specific set of facts and circumstances. Petitioners have failed to point out a specific conflict with any of this court's precedents or with any decision of other Court of Appeals. There is no conflict and no justification for this Court's intervention.

II. The First Circuit's decision regarding petitioners due process claim is not in conflict with the decisions of this Court or any Federal Circuit Court of Appeals

It is well-established that in order to succeed on a claim of deprivation of property without due process,

a public employee must prove that he has a property interests in continued employment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976). If the public employee demonstrates that he has a property interest in continuing employment, then he must be afforded a hearing for his discharge to comply with the requirements of due process of law. See *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985). The determination whether a public employee has a property interest in continuing employment must be "decided by reference to state law". *Bishop v. Wood*, 426 U.S. at 344.

The doctrine in the First Circuit is quite clear that, under Puerto Rican Law public employees hired for career positions in violation of agency regulations enacted under the Puerto Rico Personnel Act, P.R. Law Ann. tit. 3, §1301-1431 (1978), cannot claim any property interest in continued employment; the career appointments are simply null and void *ab initio*. *Kauffman v. P.R. Telephone Company*, 841 F.2d 1169, 1173 (1st. Cir. 1988); *Santiago Negrón v. Castro Dávila* 865 F.2d 431, 436 (1st. Cir. 1989). In *Kauffman* the First Circuit cited with approval the cases decided by the Supreme Court of Puerto Rico in *Torres Ponce v. Jiménez* 113 P.R.D. 58 (1982); *Colón v. Mayor of Municipality of Ceiba*, 112 P.R.Dec. 740 (1982); *Franco v. Municipality of Cidra*, 112 P.R.Dec. 260 (1982). In the present case, the First Circuit found that the record contained "uncontradicted evidence" that plaintiffs' appointments were "unlawful and void as a matter of commonwealth law" and that, there-

fore, the "jury could not lawfully find to the contrary". Petition's Appendix, at page 14a.[4]

No matter how Petitioners try to characterize the due process issue presented for review, the fact is that they are asking this Court to reverse the First Circuit on an interpretation of Puerto Rican Law. As the First Circuit of Appeals put it, Petition's Appendix at page 15a, the question in the due process claim:

> [h]as to do with whether or not Puerto Rico Law gave the plaintiff a sufficient 'property' interest in their jobs as to the invoke the protection of the Fourteenth Amendment. We can find no significant difference between *Kauffman* and this case [so] we must reach the same conclusion. *Plaintiffs did not show sufficient property interest in their jobs;* hence their jobs did not fall within the scope of the Fourteenth Amendment protection of property rights.

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[4] Again, without any basis in fact, Petitioners assert that "the jury found that plaintiffs' appointments were made in compliance with FCC regulations". Petition at page 15. The jury found no such thing. The special verdict directed the jury only to find whether Petitioners were "career" employees pursuant to a district Court's instruction that a career employee was "somebody who *appears* to be a career employee". See Petition's Appendix at pages 13a and 29a. The Court of Appeals found that these instructions "may have suggested to the jury that, as a matter of law, they had to find that the plaintiffs were career employees". Id at 13a. Thus, the fact is that under the District Court's instructions the jury did not need to make a finding of compliance with FCC's personnel regulations or the Commonwealth's personnel laws because a career employee was anybody "who appears" to be one.

Petitioners also clearly misunderstand the difference between a First Amendment claim for political discrimination and a due process claim. See Petition at pages 15-16, 19-20. The existence of a property interest is only relevant to the due process claim. A mere reading of the Opinion of the First Circuit clearly indicates that the interpretation of Puerto Rican Law, for purposes of determining whether Petitioners have a property interest under Puerto Rican Law, is an inquiry pertinent only to Petitioners' due process claim. Similarly, the claim of political discrimination is entirely independent of and separate of the due process claim. Even if it were true, which it isn't, that Petitioners had prevailed in their political discrimination claim the determination of whether they had a property interest under Puerto Rican law would not be affected one way or the other. That is the clear lesson of *Perry v. Sinderman*, 408 U.S. 593 (1972) and its progeny. See also *Elrod v. Burns* 427 U.S. 347 (1976); *Branti v. Finkel* 445 U.S. 507 (1980).

In the same vein, Petitioners attempt to picture the case of *Santiago Negrón v. Castro Dávila* 865 F.2d 431 (1st. Cir. 1989) as in conflict with *Kauffman* and the First Circuit Opinion in the instant case, reflects the same misconception. In *Santiago Negrón v. Castro Dávila*, the Court rejected the theory that the lack of a property interest, because of the plaintiffs' illegal appointment, precluded their First Amendment claims. *Kauffman* and its progeny, therefore, stand "only for the proposition that if a government employee is hired in violation of the Personnel Act of Puerto Rico, he or she has no property interest in the position and, hence, no due process right to a hearing before discharge", 865 F.2d at 436.

Thus, the First Circuit's decision is merely a ratification of settled First Circuit precedent regarding an interpretation of local Puerto Rican Law and judicial pronouncements regarding the question of when a public employee acquires a property interest in his job. As this is a matter purely of local Puerto Rican Law, it is impossible to argue that a conflict exists between the First Circuit's decision and any decision of this Court. Petitioners have also failed, naturally, to point out any specific conflict with decisions of other Courts of Appeals. There is no reason or justification for this Court's intervention in the present case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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